Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

AL-KELANI, INC.,
ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE
IREDALE, GEHAD AND HASHIM AL-KELANI
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as Receiver for Audubon Federal
Savings & Loan Association
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

Volume II. of II.

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A-168

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 92-2819

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as Receiver for Audubon Federal
Savings & Loan Association, Plaintiff

versus

LAKE TARPON RESORT, INC., AL-KELANI, INC.
ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE
IREDALE, GEHAD AND HACHIM AL-KELANI
Defendants

On Appeal from the United States District Court for the
Middle District of Florida

REPLY BRIEF OF APPELLANTS AL-KELANI, INC. ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE IREDALE, GEHAD AND Hachim AL-KELANI IN APPEAL NO 92-2819

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STATEMENT REGARDING ORAL ARGUMENT

Appellants Al-Kelani, Inc., Alan Braithwaite, Douglas and Antoinette Iredale, Gehad and Hachim Al-Kelani, maintain that oral argument is necessary to avoid any question involving "due process" upon this Court's entry of de novo findings and issuance of Mandate deemed necessary to address issues of contract construction, statutory interpretation, fiduciary violations by federal receiver and constitutional law questions which were not addressed in the lower court. Oral argument is deemed necessary to avoid any hindrance of this Court's ability to address and resolve de novo, affording full and final relief upon appeal, according fundamental fairness demanded in equity to deny further proceedings obfuscated by the passage of time and voluminous case record that must be reviewed by this Honorable Court. Oral argument will supplement the briefs and facilitate the Court's full understanding of the disposition of the case below and the issues on appeal. Accordingly, it is the position of appellants that oral argument is necessary in the instant case.

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STATEMENT OF THE ISSUES

ISSUE I. FDIC's argument regarding appeal being moot is without merit.

ISSUE II. FDIC secured Summary Judgment upon misapplication of statutory authority of 12 U.S.C. §1823(e) and D'Oench doctrine.

ISSUE III. FDIC's response arguments to constitutional claims are utterly devoid of merit.

ISSUE IV. FDIC's argument against imposition of sanctions avoids the issue and would require ratification of the very conduct which demands extreme sanctions against FDIC.

ARGUMENT

ISSUE I.
FDIC'S ARGUMENT REGARDING APPEAL BEING MOOT IS WITHOUT MERIT

The cases and authority relied upon by FDIC simply cannot stand critical analysis or support the argument that borrowers and guarantors "appeal of the final judgment of foreclosure is now moot." Not one Eleventh Circuit case cited by FDIC involved an appeal from foreclosure proceedings upon which relief was sought before the appellate court.

FDIC, at page 10 of Appellee's Brief, cites In Re Sewanee Land, Coal & Cattle, Inc., v. Lamb, 735 F. 2d 1294 (11th Cir. 1984) as authority for this Court to find the issues raised by Borrowers and Guarantors are now moot. This Court did articulate the "text", id at 1295, quoted by FDIC at pages 10-11 of Appellee's brief. However, FDIC's brief invidiously "omitted" this Court's final reference of authority appearing at the end of the "text" which referenced "Moore, id. at 8-10."

FDIC's arguments and case precedent are rendered specious upon authority of 9 J. Moore, Federal Practice ¶ 208.03 at 8-10, which states, in pertinent part, as follows:

> . . . But the appellant does not lose his right of appeal merely because the judgment has been executed or otherwise acted upon if he can secure effective relief following reversal. **A prevailing party who acts upon a judgment before an appeal is determined cannot complain that his adversary should have obtained a stay to prevent him from acting.** (Bolding added for emphasis). (citations omitted).

The Moore authority, Ibid., cited in Sewanee, invalidates FDIC's argument before this court. FDIC's own case authority, upon piercing the misleading impression of the quoted "text" from Sewanee, denies application in the instant case. FDIC brazenly obfuscates case precedent of this Court, which properly construed unavailable to a "party plaintiff" (R5-121).

FDIC's utilization of American Grain Association v. Lee-Vac, Ltd., 630 F.2d 245 (5th Cir. 1980), at page 10 of its brief, and Markstein v. Massey Associates, Ltd., 763 F.2d 1325, 1327 (11th Cir. 1985), at page 11 of its brief, are both totally without value as precedent in the instant case before this Court, when the appeal seeks relief against the "party plaintiff" in the lower court proceedings on appeal. In essence, FDIC would have this Court find that it can lie, steal, financially coerce and intimidate its adversaries without equitable, statutory or constitutional restraints; and, if FDIC is able to effectuate execution on its judgment obtained thereby, appellate review becomes "moot."

FDIC's citing In Re Matos, 790 F.2d 864 (11th Cir. 1986) at page 11 of its brief, constitutes intentional conduct for improper purpose of inducing this Court into according Matos value as precedent without any basis in law to justify FDIC's deceptive arguments. FDIC's assertion that "this

Court dismissed an appeal as moot where, as here, "the purchaser of the property at the foreclosure sale was a party to the appeal" serves to improperly manufacture illusion that Matos holding applies to the instant case. Matos involved appeal from an independent proceeding in bankruptcy, not from foreclosure proceedings, thereby rendering the facts, law and reasoning totally distinguishable from the instant case.

Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260 (7th Cir. 1986), is cited at page 11 of Appellee's brief. The Meyer case is distinguished by virtue of the facts and law that was before the Seventh Circuit Court of Appeals. FDIC's reliance upon In Re Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1985) and Duncan v. Farm Credit Bank of St. Louis, 940 F.2d 1099 (7th Cir. 1991), at pages 11-12 of Appellee's brief, likewise fails to provide valid case precedent for FDIC's argument of the instant appeal being moot.

FDIC's litigation conduct, sub justice, compels this Court's resolution of genuine issues analogous to issues identified in John Demjanjuk v. Joseph Petrovsky, et al., Case No. 85-3435 presently before the Sixth Circuit Court of Appeals. This case raises fraud issues addressed in the Report of the Special Master, commissioned by the Sixth Circuit. Judge Thomas A. Wiseman, Jr., in Special Master's Report, at pages 171 - 176, noted:

> The Federal Rules of Procedure and the codes of professional responsibility establish conclusively that attorneys, as officers of the court, are proscribed from conduct that, although unintentional, wilfully remains blind to the obvious, or constitutes averments of facts or law about which the attorney is ignorant and knows of his or her ignorance. (citations omitted).

2. Nondisclosure

The parties apparently disagree that intentional nondisclosure in circumstances imposing a duty to disclose can constitute fraud

> on the court. . . . . For the record, ... intentional nondisclosure under circumstances which impose a duty of disclosure can constitute fraud. Requiring the involvement of an officer of the court in the fraud as a prerequisite to a motion under Rule 60(b) sufficiently limits the scope of the doctrine to prevent it from swallowing up the time-limited motion available for fraud in general. Furthermore, there is no rationale to justify treating intentionally fraudulent statements differently from intentionally fraudulent nondisclosures when one is under a duty of disclosure. To treat the situations differently is to surrender the Rule's equitable intention to the vagaries of the culprit's syntax. . . . . (citations omitted).

4. Elements

Thus, fraud upon the court as I have described it comprises conduct:

1. On the part of an officer of the court;
2. That is directed to the "judicial machinery" itself;
3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court.

This Court is charged to resolve repeated motions filed sub justice, alleging fraud upon the lower court in FDIC's pleadings, discovery responses and motion filings. The integrity of the judicial process demands this Court's plenary review and de novo findings. This Court's case precedent, prior to Demjanjuk, specifically addressed "willful blindness"

in Chanel, Inc. v. Italian Activewear of Florida, Inc., 931 F.2d 1472, 1476 (11th Cir. 1991) (We accept. . . willful blindness could provide the requisite intent or bad faith.) The Eleventh Circuit Court's case precedent deny FDIC, in "the public interest," ability to escape accountability for its outrageous "willful blindness," which would destroy sanctity of the Constitution.

The factual and legal issues before this Court distinguish each and every case cited by FDIC. It is contumacious for FDIC to assert that appellate review is "moot" against FDIC, the "prevailing party." FDIC's "willful blindness" to genuine issues of prejudice occasioned by false pleadings, violations of clear statutory mandates, "bad faith" discovery practices and Rule 11 issues demands de novo resolution of every issue raised in the lower court case record. See Baumann v. Savers Federal Savings & Loan Assoc., infra, page 13. This Court's binding case precedent demands de novo resolution of not only fraud upon the court, but issues raised and applicable to FDIC's fraud against Defendants. Ibid.

ISSUE II.

FDIC SECURED SUMMARY JUDGMENT UPON MISAPPLICATION OF STATUTORY AUTHORITY OF 12 U.S.C. §1823(e) AND D'OENCH DOCTRINE

A. FDIC's attempt to justify its position on appeal through self serving argument which supports finding "Absence of a Genuine Issue of Fact" upon the "Plain Language of the Loan Documents" cannot stand appellate scrutiny.

Appellee's self-serving argument, at page 13 of its brief, that "it is undisputed that the $8 million loan secured by the mortgages and guarantees has been **in default for over 5 years** by the time the district court entered summary judgment" is false. FDIC's conclusory assertion of "undisputed . . . default," Ibid., contradicts the lower court

case record (R5-148-8-13). This Court's case precedent of Clayton v. Howard Johnson Franchise Systems, Inc., 954 F. 2d 645, 648 (11th Cir. 1992) and well established Law of Contracts providing for integration of mortgage documentation (Appellants Initial Brief, pg. 24), placed FDIC upon notice of a genuine issue that Plaintiff was in breach of its contractual obligations.[1] FDIC's "willful blindness" to wrongful statutory preclusion issues (e.g. 12 U.S.C. §1823(e)), occasioned by its pleadings, evasive discovery responses and motion filings, imputes vexatiousness, "bad faith," and fraudulent purpose to FDIC's litigation conduct from the date FDIC was substituted as "party plaintiff" (R5-121).

FDIC's seemingly straightforward statement, Ibid, is followed by the following docket references, "(R-246, par. 10; R8-213-112, line 10)." FDIC's reference to (R-246, par. 10), from the Affidavit of Frank H. Thaxton, and (R8-213-112, line 10) taken out-of-context from the deposition testimony of Alan Braithwaite, documents only an illusion for the conclusory assertion of "undisputed . . . default." FDIC's arguments only serve to document vexatious and constitutionally repugnant litigation strategy to paper over its wrongful avoidance of factual and legal issues denied informed resolution by three successive federal district judges.

FDIC's reliance upon the lower court's "conclusion," asserted at pages 13-14 of its brief, that "borrowers fail to point to any provision of the Guarantees and Mortgages that make their obligation in any way *contingent* upon Hawkins or any other firm being the contractor" is an outrageous willful blindness. The self-serving quote, ibid, set forth without docket reference, is seemingly taken out of context from the lower court's Order (R8-232-2-3), which states as follows:

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[1]FDIC's own pleadings, exhibits and discovery responses are expressly contradicted by the belated admissions of its designated representative, Frank H. Thaxton, at Rule 30(b)(6) deposition taken on February 14, 1992. (See Appellants Initial Brief at pg.

> . . . As the moving party, Defendant Al-Kelani, Inc. has the burden of showing the absence of a genuine issue of material fact. See Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). It has not met its burden in this case. For instance, the Defendant has not produced or pointed to any evidence in the record showing that its obligations under the Note, Guarantee, and Mortgage in this case were contingent or dependent on the Building Contract with Enterprise Building.

The lower court's integrity, its well established responsibilities under clear statutory mandates, case precedent and compliance with its own procedural rules, necessary to ensure "due process," commanded the articulation FDIC quotes from the lower court's Order. Ibid.

FDIC's knowing fraud upon an overburdened lower court is manifest upon analysis of the Order, ibid, expressly contradicted by the Notice of Commencement[2] filed pursuant to Florida Statutes, §713.13 which identified Enterprise Building Corporation as Contractor with Audubon Federal Savings and Loan Association designated to receive a copy of the Lienor's Notice pursuant to Florida Statutes, §713.13(1)(g). FDIC, its agents, employees and attorneys, are further charged with full knowledge the Complaint was deceptive, Responses to repeated Request for Admissions false, and Answer (R3-72-4, ¶25) a blatant lie.[3]

First, FDIC secured successive lower court orders upon insidious product of "willful blindness" and then utilized said orders to deny subsequently appointed Judges ability to render informed rulings. FDIC is charged with full knowledge that without ability of Federal District Judges, with burgeoning case loads, to rely upon the integrity and

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[2] See Motion for Equitable Relief (R5-132-2), Appendix 1.

[3] Supra at Note 1. See also Appellants' Initial Brief, pages 10-17.

continuing validity of prior orders, the administration of justice would grind to a halt.

FDIC had sole and exclusive possession of the only fully executed contract documentation identifying Enterprise Building Corporation as the approved "Contractor" identified in the Construction Loan Agreement and was charged with full knowledge the lower court could consider only "admissible evidence showing any genuine issue to be tried." Barnett v. Howaldt, 757 F.2d 23, 26 (2d Cir. 1985). It is manifest that FDIC must produce "significant probative evidence tending to support [or deny] the complaint." First National Bank v. Cities Service Co., 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968). (Bracketed notation added). This Court is charged to resolve whether FDIC maliciously and fraudulently withheld honest and forthright discovery responses of "significant probative evidence," ibid, without which, Defendants were denied critical evidence necessary for an informed resolution of the controversy, sub justice.

FDIC, for its argument to succeed, must survive this Court's "de novo" determination of whether the Order (R8-232-2-3), upon which FDIC secured clarification and summary judgment, was or was not the product of vexatious litigation conduct, false and deceptive pleadings and "bad faith" discovery practices. The issues of misapplication of law, upon false factual understandings, manufactured by FDIC's insidious litigation abuses, undetected before the lower court, never subject of findings or evidentiary hearing, must stand the "test of time" and plenary review by this Court. See Linder v. Portocarrero, 963 F.2d 332, 334 (11th Cir. 1992) (. . . Errors of law in evaluating the dismissal of the complaint are subject to plenary review by this court.) The foregoing applies to "[e]rrors of law" in securing "dismissal" of borrowers' and guarantors' Counterclaim.

FDIC's argument would have this Court "assume," in review of the district court rulings, that which the Supreme Court declined to do in Salve Regina College v. Russell, 111

S. Ct. 1217, 1223 (1991), Justice Blackmun in delivering the Court Opinion, noting:

> We decline the invitation to assume that courts of appeals craft their opinions disingenuously. The fact that an appellate court overturns an erroneous determination of state law in no way indicates that the appellate court is not applying the rule of deference articulated in the opinion.

Likewise, FDIC's self-serving conclusion attributed to the lower court's articulation "in no way indicates that the [district court was] not applying the rule of deference,'" Ibid. (Bracketed notation substituted). The lower court's Order (R8-232-2-3), supra, noted "Defendant has not produced or pointed to any evidence . . . that its obligations . . . were contingent . ." is consistent with statutory preclusion of 12 U.S.C. §1823 (e). The de novo issue is whether FDIC insidiously seeks affirmance before this Court upon successful product of its artifice and deceit. In Associated Builders, Inc. v. Alabama Power Company, 505 F.2d 97, 100 (9th Cir. 1974), the court noted:

> . . . Conclusory allegations and unwarranted deductions of fact are not admitted as true, *Ward v. Hudness*, 5 Cir. 1966, 366 F.2d 247, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint. . . .

FDIC's "willful blindness" in its arguments before the lower court, now evidenced on appeal, are inapposite to the known documentation and information that FDIC, under clear statutory mandate, had a ministerial duty to fully disclose before the lower court. This Court is charged to find, de novo, that FDIC could not have maintained an "honest" belief in its adversarial position. The binding case precedent applicable to "conclusory allegations and unwarranted deductions" Ibid., when applied to FDIC's Complaint,

establish that false "conclusions" and erroneous "deductions" were maintained long after FDIC lost the ability to claim an honest belief in their truthfulness. (See R4-85-4, 8-9, notes 14, 43 and 49).

FDIC had ministerial duty under clear statutory mandate that "the Corporation shall continue to be subject to the fiduciary duties . . . to claimants . . " 12 U.S.C. §1823 (d)(3)(C), and statutory mandated obligations to "pay all valid credit obligations of the association," 12 U.S.C. §1729(b)(1)(B), to "liquidate its assets in an orderly manner," §1729(b)(1)(A)(v), and to "settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith," §1729(d). FDIC cannot, in "good faith," justify its arguments seeking lower court's confirmation of rulings upon the grounds asserted at pages 16-17 of Appellee's brief.

FDIC's reliance upon Vernon v. Resolution Trust Corporation, 907 F.2d 1101 (11th Cir. 1990) (hereinafter Vernon I), does not provide valid case precedent and authority in support of FDIC position. Proper analysis and application of Vernon I and subsequent companion case before this Court in Vernon v. FDIC, 981 F.2d 1230 (11th Cir. 1993) (hereinafter Vernon II), provides binding case authority in support of granting borrowers and guarantors relief for FDIC's violations of the identical statute (i.e., 12 U.S.C. §1729 (b)(1)(B)) expressly identified in the Vernon II at page 1232, note 1. It is submitted that Vernon II demands de novo resolution of every statutory issue identified in motion proceedings held before the lower court.

2. It is FDIC's assertion that "D'Oench Bars Defenses Based on Evidence Outside the Loan Documents;" and, it is the inapplicability of D'Oench under well established Florida and Federal precedent, which demands resolution on appeal.

It constitutes blatant fraud for FDIC to employ "willful blindness" to the unconscionable advantage and prejudice

occasioned by false allegations in pleadings and evasive discovery responses which denied borrowers' and guarantors' ability "to point to documents that clearly manifest[ed] the bilateral nature of the [parties] rights and obligations." FSLIC v Gordy, 928 F. 2d 1558, 1563 (11th Cir. 1991) (citations omitted) (brackets in original). FDIC's insidious "willful blindness" administratively overturns this Court's binding precedent. Ibid. It was FDIC's continuation of the litigation, sub justice, upon the product of fraudulent and malicious non-disclosure of material fact and failure to properly amend its pleadings, acknowledging the Enterprise Building Contract,[4] which denied lower court the ability "to point to documents that clearly manifest[ed] the bilateral nature of the [parties] rights and obligations." Ibid. The lower court's integrity to the Federal Rules of Evidence denied informed resolution of the pleadings and motions filed before the lower court. See Fed. R. Evid., Rule 102.

FDIC maintained pleadings, identifying Hawkins, not Enterprise, and utilized "willful blindness" to avoid substantive law applicable to the **true facts** in motion strategy and discovery responses. FDIC's arguments would require inference inapposite to specific designation of Enterprise in the agreed mortgage documentation; notwithstanding, such inference would violate established principles of contract interpretation. Blake Const. Co., Inc. v. U.S., 987 F.2d 743, 746, (Fed. Cir. 1993) (Contracts are viewed in their entirety. . .). Appellate scrutiny of Frank H. Thaxton's admissions at deposition taken pursuant to Rule 30(b)(6), Fed. R. Civ. P., destroy FDIC's argument at page 16 of its brief, that "borrowers' . . . must depend on introduction of parol evidence." This argument is specious and totally without merit. FDIC cannot escape accountability or proper

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[4]FDIC's failure to timely and fully disclose the Enterprise Building Contract's attachment to the duly approved Construction Loan Agreement, attached as an Exhibit to Plaintiff's Complaint, precluded any evidentiary value or consideration of the true facts, belatedly acknowledged by Frank H. Thaxton at 30 (b) (6) deposition. (See Supra, note 2)

imputation of knowledge disclosed by its own designated representative's belated "admissions." Ibid. The "clear and unequivocal loan documents" relied upon by FDIC, once plenary review frees this Court from Plaintiff's artifice and deceit, shall demand entry of summary judgment in favor of Defendants. Jonathan's Landing, Inc. v. Townsend, 960 F.2d 1538, 1545 (11th Cir. 1992)

FDIC's argument that "borrowers' argument challenging the foreclosure must depend on introduction of parol evidence of oral agreements or understandings varying the terms of the documents" (Appellee Brief, pg. 16), relies upon this Court's failure to pierce the "veil of obfuscation" which succeeded before the lower court. Plaintiff, not borrowers and guarantors, seeks to predicate its claim upon documentation at variance with the plain language of the agreed mortgage documentation. Enterprise Building Agreement, not Hawkins, was attached to the Construction Loan Agreement. Established rules of contract construction deny FDIC ability to assert "parol evidence" argument which relies upon inference, inapposite to the unambiguous language and exhibits attached to the approved mortgage loan documentation. FDIC's "parol evidence" argument is totally lacking Intellectual Integrity. FDIC's fraud and deception, now disclosed, denies this Court's according any "good faith" whatsoever to FDIC's convoluted and twisted attempt to justify its "parol evidence" argument. McDonald v. Hamilton Elec., Inc. of Florida, 666 F.2d 509, 512, (11th Cir., 1982) (. . . unless there is a patent ambiguity, the plain meaning of the words should be followed). FDIC would create inference of "parol evidence" upon argument denied by the "plain language" which identified Enterprise, not Hawkins.

FDIC's argument would have this Court blind itself to errors of fact and law, occasioned through insidious trial strategy of "willful blindness" and maintained long after FDIC could escape this Court's de novo imputation of arbitrary and fraudulent intent to secure misapplication of the substantive law of 12 U.S.C. §1823(e) and Supreme Court case

precedent of D'Oench Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 reh'g denied, 315 U.S. 830, 62 S.Ct. 910, 86 L.Ed 1224 (1942). FDIC's arguments are frivolous, a blatant "fraud upon this Court," and clear violation of FRAP, Rule 38. FDIC's continued vexatious strategy of "willful blindness" demands appropriate de novo findings; and, FDIC's willingness to gamble upon appellate strategy of "willful blindness" further demands a de novo sanction and issuance of a mandate that shall forever place a "chilling effect" on any government entity gambling with the integrity of the federal appellate court process.

C. FDIC's argument that "Fundamental Rights provide no Basis for Reversal" of the "Summary Judgment" cannot stand upon established facts, law and case precedent.

FDIC, with impunity, would have this court declare "moot" and foreclose Appellate review of whether it secured summary judgment upon misapplication of 12 U.S.C. §1823(e) and D'Oench. FDIC would have this court, upon procedural grounds, deny proper "de novo" determination of facts and law applicable to its litigation conduct. This Court's binding case precedent requires plenary review and de novo resolution of whether Defendants' protestations of non-disclosure, "willful blindness" and fraud by FDIC, maintained in countless motion proceedings before the lower court, are now established to be true. The integrity of the United States Constitution demands this Court's de novo resolution of whether FDIC's "willful blindness" consummated a total abridgement of fundamental Fifth and Seventh Amendment Constitutional Rights of borrowers and guarantors. The binding case authority of Salve Regina, supra, demands de novo resolution of every factual and legal issue raised in motion proceedings subsequent to the filing of Plaintiff's Complaint.

FDIC's two paragraph response addressing "fundamental rights" (Appellee's brief, pgs. 19-20) serves to confirm "willful blindness" and intentional failure to acknowledge litigation conduct that is indefensible. This

Court's "reverence" and acknowledgement of fundamental rights, protected against government abridgement under the United States Constitution, command this Court's "de novo" finding of FDIC's full understanding and accountability for violation of borrowers' and guarantors' fundamental rights. See McKinney v. Pate, 985 F.2d 1502, 1513 (11th Cir. 1993), noting at concurring opinion, note 9:

> 9. Nor can a state restrict substantive rights through procedural definition:
>
> > The point is straightforward: the Due Process Clause provides that certain substantive rights–life, liberty, and property–cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. . . . "

Fundamental Rights have long been recognized as necessary for a free society to exist. Our government, without absolute sanctity of Fundamental Rights recognized and demanded of government cloaked agents, shall inevitably follow the path of all those democratic governments previously established by man; and, which failed when those governments abridged in the name of the People the very rights which occasioned their creation.[5]

FDIC's factual arguments and its citation of Golden Oil Company v. Exxon, 543 F.2d 548, 551, n.3 (5th Cir.1977) (Appellee's brief, pgs. 19-20), are totally without any merit,

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[5]The Federalist Papers. No. 18.

whatsoever, and are non-responsive to the genuine issues of FDIC having violated Fundamental Rights of borrowers and guarantors. FDIC directs its response argument to immaterial factual issues and avoids good faith acknowledgement of significant factual conflicts arising out of its own pleadings, exhibits and discovery materials disclosed of record. FDIC's "willful blindness," continued on appeal, constitute fiduciary violations in direct contradiction of clear statutory mandate demanding de novo finding that Plaintiff (FDIC) knowingly and maliciously secured erroneous entry of Order (R8-232-2, ¶ 8), striking Defendants' Affirmative Defenses. FDIC's citation of Golden is devoid of value as precedent. FDIC's arguments before the lower court and now on appeal establish a total lack of respect for the law or fear of accountability before the judiciary. (See R8-212-1-20).

The Eleventh Circuit has clearly established authority to review and resolve all issues raised and identified in motion proceedings before the lower court. Furthermore, review is proper for issues clearly identified in the case record on appeal and falling within established exceptions recognized by this Court. The foregoing has been clearly confirmed in Baumann v. Savers Federal Sav. & Loan Assoc., 934 F.2d 1506, 1512 (11th Cir. 1991), the Court specifically noting in an RTC case, as follows:

> . . . As discussed above, this court generally will not address an issue that has not been decided by the trial court. Application of this rule, however, is in the discretion of the appellate court, *see Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815, 817 (11th Cir. 1991), and there are situations where it is appropriate for us to entertain an argument not raised below. In *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355 (11th Cir.1984), this court described five such situations:
>
> First, an appellate court will 'consider an issue not raised in the district court if it involves a pure question

> of law, and if refusal to consider it would result in a miscarriage of justice.' Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in first instance 'where the interest of substantial justice is at stake." Fourth, 'a federal appellate court is justified in resolving an issue not passed on below . . . where the proper resolution is beyond any doubt.' Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.
> Id. at 360-61 (citations omitted); see also In re Daikin *Miami Overseas, Inc.* 868 F.2d 1201, 1206-07 (11th Cir.1989) (addressing the five considerations).

FDIC has placed in controversy issues of fraud and non-compliance with the established principles of equity, constitutional restraints, court rules, statutory regulations and case precedent. Appellee's brief would have this Court confirm the lower court rulings upon the product of its successful "artifice and deceit," sub justice.

The Fundamental Rights, which FDIC seeks to dismiss with its two paragraph response (Appellee's brief, pgs. 19-20), involve the real property assets pledged as additional collateral[6], and specifically secured under the Constitution of the State of Florida at Article I § 9. Proper appellate review demands de novo resolution of "bad faith" issues, fiduciary violations, statutory violations and substantive issues of FDIC's abridgement of borrowers' and guarantors' constitutional Rights protected under the 5th and 7th Amendments. The foregoing unresolved issues, never subject of evidentiary hearing, has placed in controversy

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[6]Plaintiff's Complaint (R1-3-3-4) at paragraphs 17, 18 and 19, Exhibits G, H and I.

every "undisputed fact" asserted in Appellee's brief; likewise, FDIC has placed into question the legal sufficiency of every ruling entered in the lower court proceedings.

Established obligations of honesty are demanded of a federal receiver; and the clear statutory mandate of 12 U.S.C. §1823(d)(3)(C) impose ministerial fiduciary obligations upon FDIC. Both of the foregoing requirements are intended and necessary to ensure "Due Process of Law" and that Fundamental Rights remain with the people, free from arbitrary governmental abridgement. FDIC's "willful blindness" to its responsibilities, now continued before this Court, place at risk the unique concept of Separation of Powers which distinguished the Constitution of the United States from all others. This Court's countenance of FDIC's "willful blindness" to ministerial fiduciary obligations mandated by Congressional Statute, and misapplication of unique statutory authority according presumptions and preferences to FDIC, shall elevate FDIC and all other agencies, similarly situate, above the express Constitutionally enunciated powers entrusted to Congress and beyond reach of the separately enunciated powers reserved to the Judiciary.

ISSUE III.
FDIC'S RESPONSE ARGUMENTS TO CONSTITUTIONAL CLAIMS ARE UTTERLY DEVOID OF MERIT

1. FDIC's Conduct Threatens Fundamental Integrity of the Constitution.

FDIC's arguments and case authorities constitutes a direct assault upon this Court and threaten established "due process" protections necessary to maintain the integrity of the Constitution. It is well settled that an independent judiciary established under Article III of the Constitution shall define the limits and validity of government action. In Marbury v. Madison, 1 U.S. (5 Cranch) (1803), Chief Justice Marshall articulated the role of the judiciary, predicating said authority upon two assumptions:

> (1) that the Constitution is the fundamental law of the nation, and (2) that the judiciary is capable of expounding that law.

It has long been established that "due process of law" must be protected by the courts. The summary judgment obtained by the FDIC in the lower court proceedings and FDIC's arguments before this Court, seeking affirmance, threaten the very Integrity of any court ensuring compliance of government agents with the "law of [this] nation" as expounded by Chief Justice Marshall, Ibid. This Court's resolution of the law applicable to the instant case shall determine whether the "judiciary [remains] capable of expounding that law." Ibid.

Ominous implications are raised of any federal agent ever again having any fear of accountability, when pursuing adversarial litigation before the judiciary, should this Court countenance FDIC's evasive arguments and wrongful utilization of case authorities on appeal, which, if accepted, would consummate summary taking of borrowers' and guarantors' constitutionally protected Fifth Amendment real property "Rights" in derogation of Seventh Amendment Right to Trial by Jury. This Court is charged to resolve, de novo, whether FDIC's arguments are all predicated upon the very "artifice and deceit" which occasioned the lower court's erroneous entry of summary judgment in the first instance.

FDIC's unhesitating willingness to foist citations of Rubin v. United States, 289 F.2d 195 (5th Cir. 1961), Louisiana High School Athletic Association v. St. Augustine, 396 F.2d 224 (5th Cir. 1968) and Cato v. Collins, 539 F.2d 656 (8th Cir. 1976) indicates a belief that this congested Court shall not have the time for one singular case, arising out of a foreclosure action, to pierce the product of FDIC's deception and expose the fallacy of FDIC's position. The improper purpose and wrongful use of case authorities reflect the state of impunity and utter disdain for any accountability under the law, now continued by FDIC before this Court.

FDIC's appellate arguments impute malicious attempt to "paper over" its own conflicting evidentiary documentation attached to its Complaint and contradictory discovery responses placed of record. FDIC's "willful blindness" to conflicts in its own evidence must be fully understood for an informed analysis of the prejudice occasioned borrowers' and guarantors' fundamental rights. Heiner v. Donnan, 285 U.S. 312, 327, 52 S.Ct. 358, 361, 76 L.Ed. 772 (1932) (The presumption here excludes consideration of every fact and circumstances tending to show the real motive . . .). This Court's analysis must be related back to the point in time each one of the plethora of motions, now demanding de novo review, were heard and resolved by an uninformed lower court. FDIC's arguments rely on this Court's inability or unwillingness to expend time and resources necessary for proper analysis of substantive law applicable to the true facts.

2. Denial for Leave to File Amended Counterclaim was a Product of FDIC's Fraud.

FDIC's argument, at page 21 of its brief, that "borrowers belatedly attempted to assert . . . amended counterclaim" and ". . . district court properly refused to allow the untimely amendment. (R10-279)" FDIC's argument blatantly seeks to capitalize upon and avoid material issues of whether delay in filing amended counterclaim was the product of Plaintiff's bad faith, malicious, and outrageous failure to timely and in "good faith" comply with minimum standards of "honesty" demanded of a federal receiver. Likewise, this Court is charged to resolve de novo and issue mandate denying "willful blindness" to ministerial obligations imposed under established statutory authority.

This Court's holdings in Baumann, Supra, significant Public and Judicial interest in the genuine issues before this Court, should further compel de novo finding of liability on the tort issues articulated in the Amended Counterclaim (Exhibit Folder) upon plenary review freeing this Court from "veil of obfuscation" which FDIC insidiously maintained

before the lower court. Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 598 (5th Cir. 1991) (. . unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial). Equity, established in the rich traditions of the Judiciary, shall not reward FDIC, upon remand, by affording litigation on liability issues obscured through years of unnecessary adversarial proceedings. Judicial interest in the Administration of Justice demand appellate resolution and mandate ending the travesty of justice FDIC seeks to consummate before this Court. Equity empowers this Court to render swift, final and complete relief. Furthermore, "due process" demands nothing less.

3. FDIC's Conduct Threatens Integrity of the Appellate Process.

It is submitted that FDIC's argument (Appellee's brief, page 22), asserting "Mortgage Foreclosure Does Not Violate The Law," that "borrowers' constitutional claims . . . do not constitute bona fide defense to a mortgage foreclosure for . . . acts of default" and "borrowers' failed to pay their obligations and committed other acts of default," are disingenuous to the successful statutory preclusion arguments and law upon which FDIC secured Order (R8-232-2, ¶ 8) striking Defendants' Affirmative Defenses and subsequent Order (R10-279-1-2, ¶ 4) striking Defendants' Counterclaim.

This Court must resolve de novo whether FDIC's litigation conduct constitutes outrageous, vexatious, arbitrary and fraudulent misuse of court rules and statutory authority. Established precedent of Chanel, supra, at pg. 3, provides authority for de novo finding of "fraud" on the part of FDIC. FDIC's attempt to articulate the issues raised in the instant proceeding as whether "mortgage foreclosure violates the

constitution" (Appellees brief, page 22) is patently specious.[7]

FDIC's insidious willingness to place "chilling effect" on borrowers' and guarantors' constitutionally protected private property Rights is fully documented by its countenance of "willful blindness," continued into this Court; and, this Court's integrity demands de novo finding that FDIC invidiously and knowingly encourages its agents, officers, employees and attorneys to place "due process of law" beyond the reach of adversaries seeking protections of the judiciary. This Court's countenance and failure to abate "willful blindness" of FDIC, shall, by such failure, elevate all government agencies entrusted with enhanced presumptions and preferences beyond control of Congressional statutory law and Rules of Court.

4. FDIC's conduct violates Separation of Powers.

The Honorable Robert H. Jackson, Late Associate Justice, Supreme Court of the United States, noted[8]:

> One of the fields of contest in which private right has been posed against public authority lies in. . . [t]he rise of these administrative agencies to become a virtual fourth branch of the Government was not foreseen by the Constitution-builders, and the relations of these agencies to the three established branches have long perplexed the courts. . .
>
> . . .
>
> It is too late in the day to continue the argument as to whether these statutory bodies which defy the constitutional principle of separation of powers are

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[7] Morgan v. United States, 304 U.S. 1, 20, 58 S.Ct. 773, 777, 82 L.Ed. 1129 (1937). (The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps). FDIC is charged with full knowledge that "due process" demands fairness.

[8] "The Supreme Court in the American System of Government," Harvard University Press, 1955, pgs 44, 46.

unconstitutional. They have been accepted as a valid part of our legal system. (citation omitted)

This Court must abate and turn back the insidious threat "posed" by the FDIC's strategy of "willful blindness" which circumvents "clear statutory mandates" and court rules. FDIC is charged with full knowledge that the foregoing requirements are necessary for "due process at law." This Court must impose sanctions at a magnitude that shall deter FDIC's conduct or risk "tyranny"[9] by the "Fourth Branch of Government" as admonished by Associate Justice Robert H. Jackson. Ibid. (See R8-212-18-20).

FDIC, with impunity, with full notice of potential imposition of multi-billion dollar sanction, nevertheless has continued arbitrary, malicious and vexatious litigation strategy before this Court. FDIC's "willful blindness" would "defy the constitutional principle of separation of powers," ibid, and would destroy that which makes our Government unique among the nations of the world.

FDIC's ability and willingness to carry forward on appeal a strategy of "willful blindness" demand this Court to impute fraud and enter de novo findings addressing FDIC's fraud raised throughout the case record, sub justice. This Court's failure *shall* doom the unique principle of Separation of Powers, expressly set forth in the Constitution. This Court's failure to set sanctions at a magnitude reflecting FDIC's financial values and amounts said agency willing to risk in seeking consummate its "fraud" shall doom our free society to tyranny.

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[9]Montesquieu, "Spirit of Laws," Vol. I, page 181. (There is no liberty if the power of judging be not separated from the legislative and executive powers.)

ISSUE IV.

FDIC'S ARGUMENT AGAINST IMPOSITION OF SANCTIONS AVOIDS THE ISSUE AND WOULD REQUIRE RATIFICATION OF THE VERY CONDUCT WHICH DEMANDS EXTREME SANCTIONS AGAINST FDIC

FDIC's "willful blindness" and non-response to this Court's case precedent of Donaldson v. Clark, 819 F 2d 1551 (11th Cir. 1987) or the case precedent established by the United States Supreme Court in Chambers v NASCO, Inc., 501 U.S. __, 115 L. Ed. 2d 27, 111 S.Ct.2123 (1991) does not diminish the necessity for this Court to resolve "de novo" whether Rule 11 and inherent sanctions in equity are demanded to ensure the integrity of the judicial process. FDIC's reluctance to defend affirmative denial of the "[Enterprise] Building Contract" in its Answer (R3-72-4, ¶ 25) imputes understanding that it is better to stand "mute" than to defend that which is indefensible.[10] FDIC, by not responding to Rule 11 or inherent sanctions demanded in equity, evidences the mental acuity of one trapped by his own actions and sufficiently alert to stand mute. FDIC knows full well that its motion conduct seeking relief from the lower court, while withholding critical documentation, served "improper purpose," specifically addressed in Donaldson.

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[10]FDIC's Answer was filed simultaneously with its Motion To Strike Affirmative Defenses (R3-73) and Motion To Strike Attorney's Fees (R3-75). Judge Schlesinger's Order (R8-232-1-2) was obtained upon misapplication of established statutory law of 12 U.S.C. §1823(e), which precluded consideration of factual and legal arguments of Defendants. The lower court's integrity to statutory law and presumptions of truthfulness, Rules of Court and case precedent, required it to accept the affirmative representations in the Plaintiff's Answer, (R3-72-4, ¶ 25), now documented as false by virtue of Frank H. Thaxton's belated admissions in 30(b)(6) deposition testimony. Impartiality of the trier demanded nothing less.

It is patently false for FDIC to assert that "borrowers do not identify any particular actions of FDIC which would allegedly *require* the imposition of sanctions" (Appellee's brief, page 24). Plenary review of the lower court record documents repeated motions seeking sanctions against FDIC for clearly identified discovery abuses, improper purpose of motion filings and knowingly maintaining false allegations in pleadings. Plenary review of the belated admissions by FDIC's designated representative, Frank H. Thaxton, (Appellants' brief, page 2) establish falsity of facts the lower court was required to accept as true in resolving issues raised in heated motion proceedings addressing Rule 11 sanctions.

It is outrageous and vexatious for FDIC to assert that "borrowers . . . had possession of the original Building Contract; and attached it to their answer filed over six years ago" (Appellee's brief, page 24, note 5). FDIC's stated argument, ibid, documents a wrongful and malicious attempt through skillful distortion of the truth, to convey the impression upon this congested and overburdened Appellate Court, that the "[Enterprise] Building Contract" was fully disclosed and considered by the lower court. FDIC sought and secured summary judgment with full knowledge of false denial of the "[Enterprise] Building Contract" in successive responses to Request for Admissions. See Appellants' Initial Brief, notes 2, 3, 4 and 5. It is a documented fact that successive Plaintiffs, standing as duly appointed federal receivers, affirmatively sought recovery against borrowers and guarantors while maintaining false denial of Enterprise Building Contract in its Answer to Counterclaim (R3-72-4, ¶ 25). FDIC avoided substantive law upon fruits of knowingly false pleadings.

FDIC's argument and utilization of Magistrate Jenkins' "order, affirmed by the district court (R8-220)," (Appellee's brief, pg. 24), seeks this Court's confirmation upon the poison fruits of its outrageous and vexatious litigation

conduct which succeeded before the lower court.[11] FDIC's strategy of "willful blindness," not responding to Appellants' arguments of false facts and misapplication of substantive law, applicable to Rule 11 and inherent sanctions in equity, reflects the contempt of a bureaucracy out of control, standing above the law and without fear of judicial accountability. FDIC, standing as a substituted "party plaintiff," filed motion (R9-242) for summary judgment and clarification of prior order with full knowledge that "prior order" (R8-232-2, ¶ 8), subject of clarification, was obtained pursuant to improper application of substantive law and false allegations of fact the lower court was required to accept as true. This Court's plenary review shall expose FDIC's evidentiary contradictions, insidiously denied scrutiny by the lower court, applicable to each and every motion filed of record. FDIC's motion for summary judgment and clarification of prior order served "improper purpose" in violation of Rule 11 and demands de novo finding that deterrence sanctions are necessary to ensure the integrity of the Judiciary.

FDIC's citation of Arabian American Oil Co. v. Scarfone, 939 F.2d 1472 (11th Cir. 1991) (Appellee's brief, pg. 24), and its citation of Chase & Sanborn Corp. v. Sanchez, 813 F.2d 1177 (11th Cir. 1987) (Appellee's brief, pgs. 7, 9 and 25), are fully distinguished by the factual and legal issues before this Court. FDIC places at risk and threatens the integrity of the appellate process, in foisting case authorities, facially valid, but utterly devoid of merit upon plenary review and in-depth analysis. FDIC gambles this Court has neither the time nor the resources to pierce the veil of obfuscation, necessary for proper plenary review, demanding de novo scrutiny of voluminous sixteen volume case record.

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[11] FDIC's "willful blindness" to genuine issues on appeal demands de novo finding of blatant fraud upon the lower court, and de novo finding that FDIC knowingly seeks to consummate said fraud before this Court. See Demjanjuk, supra at page 3.

It is submitted that the Honorable Judges of this Court, upon plenary review, are charged with de novo resolution of whether the case record on appeal establishes "wrongful conduct and malicious purpose on the part of FDIC . . . " (Appellee's brief, pg. 25). Likewise, it is for this Court to resolve, de novo, whether FDIC falsely states and vexatiously foists improper argument that "borrowers' failure to allege any particular factual basis . . . requires affirmance of the denial of their Motion for Sanctions." Ibid. The appellate procedures and established case precedent which demand plenary review and de novo consideration are designed to expose those who would misuse the Federal Rules of Civil Procedure. This Court's binding case precedent, long established to ensure the integrity of the judicial process, now denies FDIC the ability to escape accountability for its insidious fraud which went undetected before the lower court.

The instant case record on appeal raises issues substantially identical to those issues identified by the lower court in Malautea v. Suzuki Motor Co., LTD., 987 F.2d 1536 (11th Cir. 1993). This Court's in-depth analysis of the trial court's decision to impose sanctions in Malautea is equally demanded in the instant case to resolve whether lower court erred as a matter of law in failing to impose sanctions.

This Court's recent decision and analysis in Pelletier v. Zweifel, 987 F.2d 716 (11th Cir. 1993), provides compelling authority that requires de novo determination of whether FDIC's position on appeal "clearly fall below the standard of reasonableness required by Rule 11." Ibid. Additionally, whether FDIC's "own evidence contradicted [its] factual allegations" Ibid.; and, whether FDIC "[w]hen [it] decided to pursue this action despite [its] knowledge that it was frivolous, [it] acted in bad faith." Ibid. This Court has authority to award "double costs and a reasonable attorney's fee under Fed.R.App. P., Rule 38." Ibid.

The Administration of Justice shall become only an illusion and court proceedings a "sham" should this Court fail to impose a deterrence sanction of a magnitude which shall

command the attention of every government agency. Let this Court find significant public interest in the Administration of Justice demands deterrence sanction of the Three Billion Dollars duly noticed by Judge Harvey E. Schlesinger (R11-223-22). If said amount fails to command honesty and integrity of government cloaked agents and their attorneys appearing before the Judiciary, then let this Court's sanction stand as authority for other courts and attorneys to intensify demand for deterrence sanctions. This Court may find, upon its de novo resolution, that the Three Billion Dollar sanction sought before the lower court is insufficient to effectively deter present threat to the Judiciary, which, if unabated, shall surely place "chilling effect" on the Independent Judiciary, established under Article III, to ensure that Constitutional Rights remain Inviolate and available to all the "People." FDIC's willingness to countenance "willful blindness" before the appellate court demands an appropriate multiple reflecting threat against this Court's ability to maintain integrity in the appellate process. See Chanel, supra, page 3, imputing fraudulent "intent" and "bad faith."

FDIC's litigation conduct, sub justice, raises genuine issues of its abrogation of minimal responsibility of honesty demanded of a federal receiver. FDIC's "willful blindness", if unabated, shall make a **mockery** of the judicial process (emphasis added). This is not the first time that government cloaked agents have exercised contemptuous litigation conduct which subjected the Judiciary to public ridicule.[12] The growth of the federal bureaucracy has no end in sight; and, this Court is not blind to the fact that with "growth"

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[12] Sharp v. Lucky, 252 F.2d 910, 924, (5th Cir. 1958). Justice Cameron in dissent noted: ". . . The Constitution was treated as a doormat on which politicians and army officers wiped their feet after wading in the muck. Never has the Supreme Court been treated with such ineffable contempt, and never has that tribunal so often cringed before the clamor of the mob." As authority, at footnote 32 noting: "The story was told in words the whole world has accepted, by Claude G. Bowers in his book 'The Tragic Era'."

shall follow necessity for greater delegation of authority to government cloaked agents.[13]

CONCLUSION

FDIC's litigation conduct and that of its predecessor, FSLIC, is perceived as the final test of whether an independent judiciary shall exist in the 21st Century. This Court is now charged to resolve, de novo, and articulate an Opinion providing that which The Honorable Robert H. Jackson could not find in his preparation for series of lectures[14] intended for delivery at Harvard University,[15] to wit:

> But I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions.

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[13]The question of whether the Article III Courts have lost control over the Administration of Justice shall not be revisited should this Court fail to place "Price of its Integrity" out of reach. This Court risks insurmountable "chilling effect" upon inviolate Rights under the Constitution should it fail to exact "Price" at a magnitude sufficient to re-inspire attorneys who have lost sight of their responsibilities and faith that the courts will match the requisite sacrifice with meaningful actions. Insufficient sanctions and fees have placed private citizens and the courts hostage to government cloaked agents, [e.g. FDIC], whom no longer fear "meaningful accountability." This Court shall establish a "chilling effect," either to foreclose sanctionable conduct on the part of government cloaked agents or forever foreclose and place "chilling effect" on any attorney undertaking sacrifice necessary to again position government agents in a posture for judicial accountability.

[14]Supra, note 8. Lecture series known as "The Godkin Lectures on the Essentials of Free Government and the Duties of the Citizen."

[15]Id., "The Supreme Court in the American System of Government," at page 80.

The Judiciary must depend on "good faith" compliance with "statutory mandates" and "rules of court" by those appearing before the state and federal courts, or surrender and subjugate its Article III authority under the Constitution to those bureaucrats who would exercise "willful blindness" in the name of public interest.

Let this Court heed the admonitions of history, and take notice of "the twelve tragic years that followed the death of Lincoln" as recited in The Tragic Era by C.G. Bowers, and notation in the preface:

> Never have American public men in responsible positions, directing the destiny of the Nation, been so brutal, hypocritical, and corrupt. The Constitution was treated as a doormat on which politicians and army officers wiped their feet after wading in the muck.

This Court is charged to take judicial notice that recent history, twice times twelve years immediately preceding the instant case, reflects "public men in responsible positions, directing the destiny of the Nation," filling the pages of our newsprint and consuming the airwaves with repeated scandals involving both the nation's highest executive and the most powerful congressional representatives.

Our nation's elected leaders presently struggle to restore public confidence in government, reflected in plethora of recent legislation and executive orders. This Court is charged to abate the insidious assault upon the integrity and independence of the judiciary by unseen bureaucrats far removed from public scrutiny, who by "willful blindness" place themselves above Congress, the Courts, Public Interest and the Rule of Law. In The Federalist Papers, No. 47, attributed to James Madison, it is noted:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the

very definition of tyranny.

If this Court mandates a sanction equal to the Three Hundred Billion Dollar annual defense budget, it shall be a small price to pay. What purpose shall be served to spend Three Hundred Billion annually to protect against threat from outside attack while Fundamental Rights, necessary for a free society, are lost because the Judiciary fails to place deterrence sanctions at a magnitude necessary to ensure the Integrity of the Judicial Process?

This Court can take Judicial Notice that FDIC continues its vexatious motion strategy of "willful blindness" before the lower court, post notice of appeal and post Appellants' filing of their Initial Brief. FDIC, upon full notice that Defendants deem necessary and shall demand enhanced sanctions of Thirty Billion Dollars as necessary deterrence sanctions to reflect and reasonably deter outrageous "gamble" that "willful blindness" might escape detection before this Court. The integrity of the Appellate process is that which FDIC willingly places at risk by its gambit.

FDIC's willingness to continue post appeal litigation strategy, sub justice, in face of Thirty Billion Dollar potential sanctions, support de novo finding and entry of sanction that **requires** in excess of Thirty Billion Dollars. (See Notice of Supplemental Authority (Dkt. No. 304), letter to Inspector General, at Exhibit B). Defendants are entitled to full relief as requested in their Initial Brief filed before this Court.

Respectfully Submitted,

/s/Daniel K. Schaffner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Reply Brief of Appellants have been served, by U.S. Mail, postage pre-paid, this 3rd day of September, 1993 to the following addressees:

Roger Meagher, Esquire
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A-209

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 93-3492

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for Audubon Federal Savings & Loan Association, Plaintiff

versus

LAKE TARPON RESORT, INC., AL-KELANI, INC. ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE IREDALE, GEHAD AND HASHIM AL-KELANI
Defendants

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF APPELLANTS AL-KELANI, INC. ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE IREDALE, GEHAD AND HASHIM AL-KELANI APPEAL NO 93-3492

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FEDERAL DEPOSIT INSURANCE CORPORATION,
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versus

LAKE TARPON RESORT, INC., et. al.
Defendants

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 FRAP, I hereby certify that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal No. 93-3492:

Al-Kelani, Inc.
Gehad Al-Kelani
Hachim Al-Kelani
Audubon Federal Savings and Loan Association
Alan J. Braithwaite
The Honorable William J. Castagna
C.E.S. Industries, Inc. d/b/a Consolidated Electric
The Honorable Anne C. Conway
Federal Deposit Insurance Corporation,
as Receiver for Audubon Federal Savings and Loan Association

LAKE TARPON RESORT, INC. et al.
v FDIC Appeal No. 93-3492

Federal Deposit Insurance Corporation,
in its corporate capacity
Federal Savings and Loan Insurance Corporation
Hawkins Construction Company, Inc.
Antoinette Iredale
Douglas Iredale
The Honorable Elizabeth A. Jenkins
Lake Tarpon Resort, Inc.
Roger Meagher, Esquire
RCA Service Co.
Daniel K. Schaffner, Esquire
The Honorable Harvey E. Schlesinger
Neal A. Sivyer, Esquire
U.T. Communications Credit Corporation
Robert M. Winick, Esquire
Robert C. Boatwright
Charles P. Hunt
Leslie J. Hunt
Samuel R. Mandelbaum, Esquire
Office of the Inspector General of the FDIC
Larry Froehlich, Esquire
Ann S. Duross, Esquire
Colleen B. Bombardier, Esquire
Jaclyn C. Taner, Esquire

Respectfully submitted,

/s/Daniel K. Schaffner
Daniel K. Schaffner, Esq.
Attorney for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants Al-Kelani, Inc., Alan Braithwaite, Douglas and Antoinette Iredale, Gehad and Hashim Al-Kelani, submit that oral argument is necessary as this case involves issues of contract construction, statutory interpretation, fiduciary violations by federal receiver and constitutional law questions which were not addressed in the lower court, obfuscated by the passage of time and voluminous case record that must be reviewed by this Honorable Court. Oral argument will supplement the briefs and facilitate the Court's full understanding of the disposition of the case below and the issues on appeal. Accordingly, it is the position of appellants that oral argument is necessary in the instant case.

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I.
STATEMENT OF JURISDICTION

The district court below had jurisdiction over this matter pursuant to 28 U.S.C. §1331.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291(b).

II.
STATEMENT OF THE ISSUES

ISSUE I. Whether the record on appeal demands de novo findings that FDIC knowingly secured the Amended Judgment in a Civil Case (R11-321) (hereinafter referred to as Deficiency Judgment) through circumvention of established Rules of Court and misapplication of statutory authority.

ISSUE II. Whether Rule 60(b) FRCP demands swift and final appellate resolution against FDIC.

ISSUE III. Whether the record on appeal demands de novo findings that FDIC knowingly secured the Deficiency Judgment (R11-321) through successful abridgement of Defendants/Counter-Plaintiffs' Constitutional Rights.

ISSUE IV. Whether the record on appeal demands de novo findings that FDIC has accountability before this Court for impositions of extraordinary sanctions under Rule 11, Federal Rules of Civil Procedure, and pursuant to this Court's inherent authority in equity.

III.
STATEMENT OF THE CASE
INTRODUCTION

It is axiomatic that if FDIC has not engaged in litigation strategy of artifice and deceit, if FDIC has not litigated in bad

faith, if FDIC has not sought misapplication of unique statutory authority, if FDIC has not secured the post-appeal Deficiency Judgment (R11-321) in derogation of Fundamental Constitutional Rights, then this Court shall find little difficulty in resolving the First Consolidated Appeal 92-2819 in FDIC's favor and finding the issues raised in the instant appeal 93-3492 moot.

However, if this Court shall find that proper plenary review of the lower court case record demands de novo findings that FDIC has exercised "bad faith" litigation conduct in discovery practices, that FDIC has sought misapplication of statutory authority, that FDIC has abused unique statutory authority according FDIC presumptions and preferences not available to private litigants, that FDIC has knowingly secured post-appeal Deficiency Judgment (R11-321) in derogation of Defendants'/Counter Plaintiffs' Constitutional Rights, then this Court is charged to issue such opinion and mandate that shall forever deter FDIC, or any other government agency, from engaging in such litigation conduct.

This Court is fully cognizant of its Constitutionally entrusted responsibility to deter government cloaked agency conduct which, if unabated, would destroy the fundamental integrity of the Administration of Justice. This Court should not countenance any argument, whatsoever, that FDIC's misapplication of 12 U.S.C. §1823(e) was the result of negligence or an honest mistake. Appellants assert proper plenary review of the lower court case record and analysis of the briefs filed in Appeal 92-2819 shall disclose a total absence of any Intellectual Integrity to FDIC's posture maintained in prior consolidated appeal 92-2819. Plenary review shall deny FDIC any argument seeking to justify or otherwise mitigate its actions in securing the post appeal Deficiency Judgment (R11-321), subject of instant appeal 93-3492.

A. **Course of the Proceedings and Disposition In the Court Below**

This Court is fully aware that separate appeals were filed before the Eleventh Circuit from the Summary Judgment (R10-279) and Final Judgment of Foreclosure (R10-286); and, this Court's consideration of said prior appeals in 92-2819 are inextricably tied to resolution of the significant issues in the instant case. On December 23, 1992, the lower court entered its Order (R11-299) confirming foreclosure sales. FDIC filed on March 24, 1993 a Motion for Deficiency Judgment (R11-300). Appellants, Defendants/Counter Plaintiffs filed on April 5, 1993 their memorandum in opposition to FDIC's Motion for Deficiency Judgment (R11-302). FDIC filed its Amended Motion for Writ of Garnishment (R11-301) on April 5, 1993.

On July 26, 1993, the Honorable Anne C. Conway entered the Court's Order (R11-303) referring all dispositive motions, sub justice, to Magistrate Judge Elizabeth A. Jenkins, with specific instructions for said judge to "submit a proposed findings of fact and recommendation." Notice of hearing (R11-304), was filed August 12, 1993, scheduled hearing for FDIC's two motions for writ of garnishment (R11-296 and R11-301) together with FDIC's Motion for Deficiency Judgment (R11-300) to be held before Magistrate Judge Elizabeth A. Jenkins at 2:00 p.m. on September 2, 1993. Magistrate Jenkins issued her Report and Recommendations (R11-308) on September 3, 1993. Defendants/Counter Plaintiffs, filed their Objections (R11-309) to the Magistrate's Report and Recommendations on September 20, 1993. The Honorable Anne C. Conway on September 30, 1993, issued her Court Order (R11-310) granting FDIC's amended Motion for Writ of Garnishment and granting FDIC's Motion for Deficiency Judgment.

FDIC filed motion (R11-312) with memorandum in support to amend the Deficiency Judgment on October 12, 1993. The lower court entered its Order (R11-320) granting FDIC's (R11-312) motion and the Deficiency Judgment (R11-321) was duly filed on November 4, 1993. On December 2,

1993, the Defendants/Counter Plaintiffs duly filed their Notice of Appeal (R11-322).

It is deemed significant on issues of FDIC's fraudulent intent and improper purpose the aforenoted motion proceedings were filed while FDIC sought procedural rulings from the Eleventh Circuit Court of Appeals in Case No. 92-2819, which, if granted, would have secured a dismissal with prejudice of all issues raised in Appeal No. 92-2819. The procedural grounds upon which FDIC sought dismissal of Appellate Case No. 92-2819, if granted, would have confirmed procedurally the very issues which Appellants assert, in the instant case, shall compel de novo findings of knowing fraud, improper purpose in motion filings and knowing misapplication of clear statutory authority on part of FDIC.

Full understanding and consideration of Plaintiff/Appellees' Motion to Dismiss and Defendants'/ Appellants' Response to Plaintiff/ Appellee's Motion to Dismiss are of critical relevance to the question of this Court imputing fraud and resolving whether to enter de novo findings that shall demand extraordinary deterrence sanctions against FDIC. Likewise, this Court's cognizance of Defendants/Appellants Motion to Certify Supplemental Record and FDIC's response filed before this Court should be subjected to critical analysis on whether said motions impute knowledge, fraud and improper purpose on the part of FDIC. The aforenoted post appeal Motions filed of record with the Clerk of the Eleventh Circuit Court of Appeals are deemed of critical significance in proper consideration of de novo issues raised in this third appeal. The significance and relevancy of the appellate motion proceedings in appeal 92-2819 are most evident in the words set forth at page 4 of FDIC's Response to Supplemental Record, Id., stating: "Moreover, a motion for deficiency judgment is not ripe until after this appeal is decided." (emphasis added)

B. **Statement of Facts**

This Court has consolidated or has the authority to consolidate the instant case with prior consolidated appeal in Case No. 92-2819. FDIC, as a matter of law, was charged with full knowledge and notice, prior to securing Deficiency Judgment (R11-321), of all de novo findings which plenary review shall demand of this Court in resolving appeal 92-2819. This Court has authority to impute knowledge, notice and full understanding of every undisputed fact this Court's plenary review discloses; likewise, this Court has authority to impute "knowledge, notice and full understanding" upon every de novo findings of law where FDIC's "willful blindness" to clear statutory mandates circumvented and avoided informed resolution sub justice. In referencing isolated facts which avoided informed analysis sub justice and notation of specific instances where FDIC sought misapplication of law, there is no intention to waive, release or deny the significance of other facts and legal issues which plenary review of the case record documents.

Any attempt to identify every material and relevant fact necessary for proper consideration of the significant issues in this case would exceed the fifty-five page limitation for Appellants' entire brief. See 11th Cir. R. 28-1(b). However, it is deemed factually significant that FDIC has authorized and acquiesced in its attorney filing the post appeal Motion for Deficiency Judgment (R11-300). This Court is requested to note the specific acknowledgement in FDIC's Response to Defendant/Appellees' Motion to Certify Supplemental Record and Additional Time to File Initial Brief, dated December 30, 1992, filed before this Court in Appeal 92-2819. FDIC, at page 4 of its Response, Id., expressly stated the exact opposite of its position in this third appeal, to wit:

> Moreover, a motion for deficiency judgment is not ripe until after this appeal is decided.

The above statement reflects full knowledge and understanding that the Motion for Deficiency Judgment (R11-300) was filed notwithstanding FDIC's acknowledgement that it was "not ripe" Id. FDIC's post appeal motions are factually significant and evidentiary on whether to impute "improper purpose" and "fraudulent intent." FDIC is charged with knowledge that fact issues avoided informed resolution, sub justice, demands de novo findings of "improper purpose" and "fraudulent intent."

FDIC's countenance of post appeal motion strategy seeking deficiency judgment is factually significant and evidentiary for de novo findings that FDIC had full knowledge that its Answer Brief in Appeal 92-2819 was non-responsive to genuine issues; likewise, FDIC's Answer Brief filed in appeal 92-2819 is evidentiary upon issues of FDIC's fraudulent intent, knowledge and notice properly subject for de novo finding on question of whether post appeal motions constituted an insidious attempt to avoid detection in appeal 92-2819 through outrageous continuation of willful, wanton and malicious motion proceedings.

On March 24, 1993, the date FDIC filed its Motion for Deficiency Judgment (R11-300), FDIC had actual and constructive notice that multi-billion dollar deterrence sanctions were being sought in appeal 92-2819 for litigation misconduct. The deterrence sanction issues were expressly and clearly noted in Appellants' Initial Brief; and, this Court can take judicial notice, once confirmed by plenary review, that FDIC's Answer Brief was non-responsive to the substantive law, misapplication of statutory authority and litigation misconduct specifically addressed in Appellants' Initial Brief filed in appeal 92-2819.

The case record factually documents FDIC's full notice and availability of a private foundation to be formed by Defendants/Counter Plaintiffs' counsel as a proper depository for reasonable multi-billion dollar deterrence sanctions. This Court is charged to resolve de novo the factual significance of clear notice to FDIC that Appellants would demand Thirty Billion Dollar deterrence sanction in August 26, 1993 letter

to FDIC's Inspector General's Office. FDIC had fiduciary duty not to secure Deficiency Judgement upon product of its undetected fraud and non-disclosure visited upon three successive federal district judges and their magistrate, sub justice.

C. **Standard of Review**

The genuine issues raised by FDIC's post appeal motion conduct arises out of the identical case record in appeal 92-2819. Appellants would adopt, as necessary foundation, the Standard of Review set forth in their Initial Brief filed in appeal 92-2819, at pages 17-18, stating:

> The instant appeal is from an order granting summary judgment and final judgment entered pursuant to provision of the summary judgment order. This Court has established that "review is plenary" and subject to the "same legal standards as those that controlled the district court in determining whether summary judgment is appropriate." Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992). The grant of summary judgment shall be affirmed "only if no genuine issues of material fact exist and only if the moving party is entitled to judgment as a matter of law." American & Foreign Ins. v. Colonial Mtg. Co., 936 F.2d 1162, 1164 (11th Cir. 1991). The proper standard of review applicable to the lower court's summary judgment Order and final judgment of foreclosure is de novo. No deference "whatsoever" is to be accorded the lower court's summary judgment Order and final judgment upon review by this Court. Salve Regina College v. Russell, 499 U.S. ___, 113 L.Ed. 2d 190, 202, 111 S.Ct. 1217, 1224 (1991).
>
> Issues of statutory violations and constitutional violations by FDIC raised in the lower court, resolved without evidentiary hearing or trial, are now subject to de novo

review by this Court. The Rule 11 sanctions and FDIC's avoidance of deterrence sanctions, denied as moot in the lower court's summary judgment order, are now subject to de novo review. This Court may substitute its judgment for that of a court below in order to correct any error or oversight on the part of the lower court. United States v. Lawson, 809 F.2d 1514, reh'g denied, 815 F.2d 717 (11th Cir. 1987); Continental Oil Co. v. Cole, 634 F.2d 188, 191 (5th Cir.), cert. denied, 454 U.S. 830 (1981).

Additionally, this appeal presents issues for review that the lower court committed error in failing to grant Defendants summary judgment. In reversal of summary judgment in favor of Plaintiff, this Court may order summary judgment in favor of Defendants. Jonathan's Landing, Inc. v. Townsend, 960 F.2d 1538, 1545 (11th Cir. 1992).

Additionally, this Court's case precedent requires de novo resolution of "a district court's interpretation and application of a statute." Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1139 (11th Cir. 1992). The lower court's entry of Deficiency Judgment upon its expressed reliance of Florida Statutory authority presents a question of law subject to plenary review by this Court. Cathbake Investment Company, Inc. v. Fisk Electric Company, Inc., 700 F.2d 654, 656 (11th Cir. 1983). The issues before this Court involve FDIC's post appeal continuation of litigation misconduct implicating knowing "fraud" and "improper purpose," specifically noted in Objections to Magistrate's Order (R11-309). The Magistrate Judge's findings or necessary conclusions of law are subject to de novo review where there has been timely filing of objections pursuant to 28 U.S.C. § 636 (b)(1). Re Holywell Corp. 967 F2d 568, 571 (11th Cir. 1992).

It is respectfully submitted that all issues subject to de novo review are subject to the standards established by the Supreme Court in Chambers v. NASCO, Inc., 501 U.S. ___, 115 L.Ed. 2d 27, 111 S.Ct. 2123 (1991) and Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed. 2d 359 (1990). Lastly, this Court's case precedent in Donaldson v. Clark, 819 F.2d 1551, 1555-56 (11th Cir. 1987), and the criteria established therein, should provide controlling authority in resolution of this third appeal.

IV.
SUMMARY OF ARGUMENT

It is beyond dispute that FDIC had actual and constructive knowledge that genuine issues of fraud, litigious conduct, financial duress, fiduciary violations, constitutional abridgement issues and "bad faith" discovery issues were subject to resolution before the Court in Case 92-2819. Likewise, Appellants submit FDIC cannot escape the actual and constructive knowledge of multi-billion dollar deterrence sanctions addressed in numerous motions, sub justice, both prior and post appeal.

FDIC has engaged in insidious post appeal motion strategy which succeeded in securing Deficiency Judgment (R11-321) before the lower court. The full significance of FDIC's post appeal motion strategy and imputation of fraudulent intent or improper purpose demands full understanding and recognition of the legal consequences had this Court granted FDIC's motions filed before this Court in Case No. 92-2819. However, this Court's de novo resolution of the significant issues in Appeal No. 92-2819 shall either render moot or confirm the enhanced scope and magnitude of its litigious, fraudulent, malicious and constitutionally repugnant litigation conduct in authorizing and funding continuation of contumacious post appeal motion proceedings before the district court and Eleventh Circuit Court of Appeals.

FDIC, by its actions and omissions, has controlled the scope and magnitude of the issues subject to de novo resolution by this Court. Plenary review of the case record in Appeal No. 92-2819 shall establish repeated "good faith" attempts on the part of Defendants to settle the case and thereby avoid significant issues now commanding this Court's resolution. It is FDIC's actions and omissions that elevated the instant case into a contest demanding counsel for Appellants, charged with responsibility as an officer of the Court, to ensure that FDIC would face accountability before this Court for litigation misconduct threatening the continuing integrity of the Administration of Justice. It was FDIC's actions which turned the foreclosure action, sub justice, into a contest threatening the Separation of Powers Doctrine demanding Appellants' counsel, as an officer of the Court, to place FDIC in a position of final justiciability before this Court.

This Court's consolidation of appeal 92-2819 with this appeal 93-3492 would appear to reflect this Court's full cognizance that applicable facts and law are inextricably bound to each other. This Court is charged to exercise plenary review of the entire case record and resolve de novo the threshold question of whether the district court applied the correct law. It is well established that conclusions of law are subject to de novo review by this Court. The necessary findings of fact and conclusions of law relied upon for entry of Deficiency Judgment are clearly evidenced in the Magistrate's Report and Recommendation (R11-308), specifically identified and placed at issue by Appellants/ Defendants' Objections to Report and Recommendation (R11-309). The Magistrate's clear articulation shall demand appropriate legal and equitable relief in the instant case upon all issues consolidated for final resolution by this Court. The lower Court Order (R11-310) adopting the Magistrate's Report and Recommendation (R11-308) clearly requires FDIC response to "critical issues" that remain "unresolved" and subject to de novo resolution before this Court.

V.
ARGUMENT
ISSUE I

WHETHER THE RECORD ON APPEAL DEMANDS DE NOVO FINDINGS THAT FDIC KNOWINGLY SECURED THE AMENDED JUDGMENT IN A CIVIL CASE (R11-321) (HEREINAFTER CALLED DEFICIENCY JUDGMENT) THROUGH CIRCUMVENTION OF ESTABLISHED RULES OF COURT AND MISAPPLICATION OF STATUTORY AUTHORITY

FDIC is charged with pervasive notice documented in motion proceedings throughout the lower court record, clearly identifying unresolved issues of Plaintiff seeking misapplication of unique statutory authority and procedurally avoiding issues of fraud and improper purpose. This Court is charged to take judicial notice of the case record on appeal; and, this Court is charged to resolve de novo whether non-disclosure of critical facts, necessary for proper application of law, wrongfully occasioned the misapplication of state statutory authority upon which Plaintiff secured the Deficiency Judgment.

FDIC stated in its Answer Brief filed before this Court in Appeal 92-2819, page 22, **"Mortgage Foreclosure Does Not Violate The Constitution."** It is submitted that FDIC's foregoing statement evidences "willful blindness" to the unequivocal notice of the real and genuine issues clearly articulated in motion proceedings sub justice and such "willful blindness" in FDIC's Answer Brief imputes fraudulent intent to avoid genuine issues raised in Appellants' Initial Brief filed before this Court in Appeal 92-2819. Appellants would submit that any attempt of FDIC to assert response argument in the present case that the state statutory authority **"Does Not Violate The Constitution"** must not be countenanced by this Court. The genuine issue before this

Court is not the unconstitutionality of the statutory authority relied upon by Magistrate Jenkins, id., but rather genuine issues of FDIC's fiduciary duty to acknowledge litigation misconduct, procedurally avoided and unresolved in proceedings sub justice, when due process and established Rules of Professional Responsibility demanded acknowledgement and response. FDIC cannot avoid knowledge and accountability for documented facts and unresolved legal issues which were pending before this Court at the time it sought and secured the Deficiency Judgment (R11-321).

Magistrate Jenkins, in her Report and Recommendation (R11-308-4-5), clearly articulated the authorities and precise bases upon which the RECOMMENDATIONS were submitted to the district judge. The Report and Recommendation (R11-308-4) specifically evidenced reliance upon "Rule 69, Fed.R.Civ.P.. . . [and further found] Florida law governs these post judgment garnishment proceedings." (bracketed notations added). The Magistrate Judge further found "Plaintiff's motion contains the averments required under section 77.03 and should, therefore, be granted" Ibid. In resolving whether to recommend entry of a "deficiency judgment" the Magistrate in her Report and Recommendation (R11-308-5) expressly identified "Fla. Stat. §702.06" and further noted:

> Fla. Stat. § 702.06.
>
> The granting of a deficiency judgment in a mortgage foreclosure action is within the discretion of the court. However, the granting of a deficiency judgment is the rule, rather than the exception, unless there are equitable considerations which warrant denying the application. Federal Deposit Ins. Corp. v. Hy Kom Development Co., 603 So. 2d 59, 60 (fla. 2d DCA 1992), review denied, 618 So. 2d 209 (Fla. 1993); Coppola v. Housing Investment Corp., 400 So. 2d 112, 113 (Fla. 4th DCA 1981).

The last paragraph in the Report and Recommendation is of critical significance for informed appellate analysis and denying FDIC sanctuary upon improper argument and unsupported inferences, to wit:

> Defendants also filed a Notice of Supplemental Authority (Dkt. 305) on September 1, 1993. This notice violates Local Rule 3.01(b), M.D. Fla., and should be stricken. Moreover, the appellate brief and August 26, 1993 letter submitted by defendants are not relevant to the issues presently before the Court.

Let this Court take judicial notice that the express articulation in the Report and Recommendation, ibid., denies FDIC asserting that the issues of fraud, improper purpose, "bad faith" discovery conduct, misapplication of statutory authority or constitutional abridgement issues were fairly considered and subject to informed resolution in FDIC's favor. This Court is charged to resolve de novo if FDIC's post appeal motion conduct demands finding of willful, wanton and malicious attempt to knowingly consummate before this Court its past fraud.

This Court is charged to review de novo, the twenty-one separately identified objections duly noted, sub justice, in Defendants' Objections to Report (R11-309-1-7). It is beyond dispute that the integrity of the appellate process shall demand plenary review of the entire lower court case record to address core erroneous findings which Appellants assert were wrongfully occasioned by FDIC's non-disclosure of critical facts. This Court is charged to resolve de novo if non-disclosure of critical facts caused erroneous application of law pursuant to unique statutory authority of 12 U.S.C. §1823(e) the lower court was required, as a matter of law, to accord FDIC.

A. Established Rules of Statutory Construction demand de novo findings of fraudulent intent and knowing misapplication of statutory authority.

This Court's case precedent denies FDIC any ability to maintain "good faith" argument seeking affirmance of the Deficiency Judgment (R11-321). In State of Ga., Dept. of Med. Assistance v. Shalala, 8 F.3d 1565 (11th Cir. 1993), the Eleventh Circuit has clearly set forth standard of review applicable to "agency's [FDIC's] interpretation of statute over which it has been delegated administrative authority [it] is entitled to deference. . . ." (bracketed notation added). In State of Ga., id. at 1567, this Court noted:

> [1] The Supreme Court established the standard for an appellate court's review of agency decisions in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first step in the Chevron two-step review is to determine whether Congress has directly and unambiguously spoken to the precise question at issue. . . . Statutory interpretation is within the special competence of the courts. If congressional intent is clear and the agency action is contrary, then that action must be set aside by the judiciary. Chevron, 467 U.S. at 843 n.9, 104 S.Ct. at 2782 n.9.
>
> (footnote omitted)

It is well established that the proper construction and application of a statute presents a question of law subject to this Court's de novo resolution. FDIC is charged with the full knowledge of the facts and applicable law disclosed upon plenary review of the case record. This Court is charged to resolve de novo whether the Deficiency Judgment (R11-321) was secured upon erroneous application of Florida Statute §702.06.

FDIC continues to fund and authorize post appeal 92-2819 motion proceedings, including this third appeal, while

charged with actual knowledge of all unresolved issues identified in the lower court record involving misapplication of the often used weapon, 12 U.S.C. §1823(e), which provides in relevant part:

> No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously from the time of its execution, an official record of the bank.

Defendants' would submit that FDIC cannot maintain in "good faith" an adversarial position on appeal which conflicts with fiduciary mandate of 12 U.S.C. §1823(d)(3)(C).

The lower court's Order (R11-310-2) specifically noted ". . . the Court overrules the Objections and the Magistrate Judge's Report and Recommendation is adopted and confirmed . . . " FDIC is charged with notice that its post appeal Motion for Deficiency Judgment (R11-300-3) specifically asserted "FDIC is entitled to a deficiency judgment" and submitted as authority therein, the following:

> Florida Statute 702.06 provides as follows:
>
> "In all suits of the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall

> be within the sound of judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor."

The binding case precedent of this Court denies FDIC resort to the lower court ruling, ibid., as justification for its adversarial position or failing to address in its Answer Brief genuine issues, unresolved sub justice, of FDIC's fraud, its "bad faith" non-disclosure in discovery proceedings, misapplication of statutory authority, violations of express statutory mandates and abridgement of substantive constitutional rights.

FDIC is charged with actual knowledge of its responsibilities for absolute compliance with clear statutory mandate of 12 U.S.C. §1823 (d)(3)(C), which provides in relevant part:

> ". . . the Corporation shall continue to be subject to the fiduciary duties . . . to claimants . . "

This Court shall resolve de novo whether FDIC secured post appeal Deficiency Judgment through misapplication of 12 U.S.C. §1823(e); and, whether FDIC's "willful blindness" to ministerial fiduciary obligations of 12 U.S.C. §1823(d)(3)(C) compels de novo finding of willful, wanton, fraudulent and malicious violations of clear statutory mandates.

In addition to the aforenoted statutory authority involving ministerial obligations, significant issues are identifiable in the lower court case record of FDIC's violations of statutory authority involving managerial responsibilities under applicable statutes. In Al-Kelani, Inc.'s Memorandum

of Law in Opposition to the Federal Deposit Insurance Corporation's Motion for Summary Judgment of Foreclosure and for Clarification of Order Striking Defendant's Defenses (R9-250), FDIC was placed upon full notice of its managerial responsibilities by virtue of the following:

> The Federal Savings and Loan Insurance Corporation ("FSLIC") was a federal agency organized pursuant to 12 U.S.C. §1724-1730(f). FSLIC was expressly charged by Congress, as receiver, with the responsibility to "pay all valid credit obligations of the association," 12 U.S.C. §1729(b)(1)(B), to "liquidate its assets in an orderly manner," §1729(b)(1)(A)(v), and to "settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith," §1729(d).

This Court must not allow the voluminous record to obfuscate unresolved issues identified in every motion proceeding held sub justice and likewise raised in every motion proceedings filed before this Court. FDIC is estopped to claim surprise or honest mistake upon de novo finding by this Court of FDIC's "willful blindness" to clear fiduciary duties under statutory mandate of 12 U.S.C. §1823(d)(3)(C) and well established fiduciary responsibilities demanded under Florida law. FDIC cannot willfully blind itself or fail to respond to genuine issues of its pleadings and discovery responses having occasioned misapplication of 12 U.S.C. §1823(e). FDIC had fiduciary duty to ensure that its Complaint, Answer and Discovery Responses did not deceive the lower court and ensure that its conduct did not occasion misapplication of the law.

In United Aluma Glass v. Bratton Corp., 8 F.3d 756, 759 (11th Cir. 1993), this Court stated:

> . . . It was exclusively within the court's province to determine as a matter of law whether the

terms of the bonds covered the damages found by the jury. Vernon v. Resolution Trust Corp., 907 F.2d 1101, 1109 (11th Cir. 1990); Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1184 (11th Cir.1985). This plain error overrides Bratton's argument that UAG's counsel consented to the instruction and verdict form which were given to the jury on the issues of the sureties' responsibility.

The post appeal motion proceedings raise significant de novo issues of whether FDIC outrageously, maliciously and with fraudulent intent sought to paper over the "plain error" occasioned by FDIC's false pleadings and evasive discovery responses which required lower court's misapplication of 12 U.S.C. §1823(e). FDIC is charged with full knowledge that its entitlement to the Deficiency Judgment (R11-321) must necessarily survive "threshold determination" that the integrated mortgage documentation was "unambiguous." See Steward v. Chamption Intern. Corp., 987 F.2d 732, 734 (11th Cir. 1993).

B. Established Rules of Court were circumvented through "willful blindness" and "bad faith" in FDIC's litigation conduct.

In Al-Kelani, Inc.'s Memorandum of Law in Support of Summary Judgment (R5-147-3), FDIC was unequivocally placed on notice that its Complaint would fail, once full disclosure and application of true facts, upon application of Rule 10 FRCP, to wit:

> Rule 10(c), Federal Rules of Civil Procedure provides:
> **Rule 10. Form of Pleadings**
> . . .
> (c) **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which

> is an exhibit to a pleading is a part thereof for all purposes.

The Fifth Circuit Court of Appeal in Simmons v Peavy-Welsh, 113 F 2d 812, 813 (1940) noted:

> . . . Where there is a conflict between allegations in a pleading and the exhibits thereto, it is well settled that the exhibits control.

> Analysis of the material provisions set forth in the Construction Loan Agreement, attached as Exhibit C to FDIC's Complaint, establishes as a matter of law that no well pled issues of material fact have been raised which allow this Court to impose liability against Al-Kelani under the expressed mortgage documentation attached to Plaintiff's Complaint.

The 30(b)(6) FRCP deposition testimony of FDIC's designated representative, Frank H. Thaxton, provides this Court with that which FDIC denied in its pleadings and discovery responses the lower court accepted as true at time post appeal rulings were entered sub justice. FDIC is charged with full knowledge that expressed allegations in its Complaint, Answer and Response to Request for Admissions called forth the statutory preclusion of 12 U.S.C. §1823(e) and the preclusion established in Supreme Court case of D'Oench Duhme. See Appellants Initial Brief in Appeal No. 92-2819 at page 2. FDIC cannot rely upon lower court orders secured upon the product of erroneous findings occasioned by improper conclusory allegations in Complaint, false Answer and evasive discovery responses.

The resolution by this Court of the genuine issues raised by FDIC's post appeal motion proceedings, which culminated in its securing a Deficiency Judgment (R11-321) against Appellants/Defendants, shall demand de novo findings of each and every issue, of law or fact, identifiable in motion proceedings when the lower court was required to

accept as true FDIC's Complaint, Answer and Discovery Responses. The lower court's Order (R11-310-2), noted at paragraph (4), "Defendants' Notice of Supplemental Authority (Doc. No. 305) shall be **STRICKEN.**" FDIC is charged with actual knowledge by the lower court's Order id., that the Deficiency Judgment (R11-321) was granted without de novo resolution of the genuine issues of FDIC's litigation misconduct which were pending before this Court in appeal 92-2819.

It is respectfully submitted that this Court is charged with responsibility to resolve de novo whether FDIC's post appeal motion proceedings demand findings of knowing, insidious, malicious and constitutionally repugnant misconduct on the part of FDIC. Likewise, this Court has responsibility to resolve de novo, whether FDIC's post appeal motion proceedings, both sub justice and before this Court, compel findings that FDIC engaged in litigation strategy of "willful blindness" long after notice that post appeal motion conduct threatened the Administration of Justice. FDIC must be charged with actual notice of this Court's authority to enter de novo findings, where demanded in the interest of justice, that FDIC knowingly secured the Deficiency Judgment (R11-321) in derogation of Appellants/Defendants substantive Constitutional Rights under the Fifth, Sixth and Seventh Amendments.

Let this Court resolve FDIC's adversarial position maintained in their Answer Brief filed before this Court in Case No. 92-2819 with the arguments and case authority set forth by Defendants/Appellants/Counter Plaintiffs, sub justice, in their Motion for Protective Order (R4-149), insidiously avoided and rendered undetectable before the lower court Magistrate, charged to accord FDIC enhanced statutory preferences and presumptions of honesty by virtue of established precedent and Rules of Court. The following two footnotes, from the aforenoted Motion ibid., are submitted as material and relevant to the instant case.

[14]Moss v Sperry, 140 Fla. 301, 191 So 531, 125 A.L.R. 909 (1939); Fishman v Thompson, 181 So. 2d 604 (Fla. 3d DCA 1965). In equity, "fraud includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, which are injurious to another and by which an undue and unconscionable advantage is taken of another."

[43]See Solomon Etting v The Bank of The United States, 6 L. Ed. 419, 421 (1826), 11 Wheat. 59, 6 Curt. 511. Daniel Webster represented the plaintiff with Chief Justice Marshall delivering the opinion of the Court affirming the lower court's judgment involving "Fraud and Concealment in Contracts". The Court noted in setting forth factual background, "[t]he law is more consistent with common justice, and says you must do nothing to deceive. It was a case of industrious concealment." Reasonable stay of discovery protecting against overburdening limited resources of present counsel becomes all the more compelling to insure counsel's ability to inform this Court, should Court agree that FSLIC's recent Motion to Strike, sought potentially dispositive ruling on D'Oench Duhme assertion, contrary to proper application of law. See also Moss and Fishman cases, supra at note 14.

This Court shall resolve de novo whether FDIC's position maintained before the lower court involved valid difference of opinion permissible under proper construction of the applicable statutory authority; or, whether the case record documents insidious, fraudulent and malicious litigation misconduct demanding entry of de novo findings that FDIC secured the Deficiency Judgment (R11-321) upon knowing misapplication of unique statutory authority according FDIC unique preferences and presumptions. The record on appeal raises genuine issues involving the

applicability or inapplicability of unique statutory authority applicable to FDIC's Complaint and motion proceedings from day one through entry of the Deficiency Judgment (R11-321) subject of this third appeal. The applicability or inapplicability of statutory authority are issues of law subject to this Court's plenary review and de novo resolution.

C. **FDIC's post appeal motion conduct would procedurally avoid genuine issues of "bad faith" non-disclosure of material facts demanded under established Rules of Discovery.**

In the Emergency Motion to Expunge Lis Pendens and Sanctions, (R7-185-3, 4,11), filed sub justice, FDIC was placed upon actual notice of significant issues raised by the following:

> FDIC filed, on December 19, 1990, Plaintiff's Motion and Memorandum of Law to Strike Affidavit of Daniel K. Schaffner and Renewed Motion and Memorandum of Law for Sanctions. On December 21, 1990, FDIC filed its Response to Defendant, Al-Kelani, Inc.'s Motion and Memorandum for Relief from Magistrate's Order dated November 23, 1990. Simultaneously, FDIC further filed on December 21, 1990, Plaintiff's Motion and Memorandum to Strike Defendant Al-Kelani, Inc.'s Motion and Memorandum for Relief from Magistrate's Order. FDIC further filed on December 21, 1990, Response to Defendants, Douglas Iredale and Antoinette Iredale's, Motion for Protection and filed a separate Motion and Memorandum for Rule 37(b) Sanctions.
>
> On January 4, 1991, FDIC filed its Motion and Memorandum for Rule 37(b) Sanctions against Defendants, Al-Kelani, Inc., Hashim Al-Kelani and Gehad Al-Kelani. FDIC further filed its Response to Defendant's Alan J. Braithwaite's Motion for

Protection and filed a separate Motion and Memorandum for Rule 37(b) Sanctions.

Al-Kelani, Inc., on January 7, 1991, filed its Reply Memoranda to FDIC's heretofore noted Motion to Strike Affidavit of Daniel K. Schaffner and FDIC's Motion to Strike Al-Kelani, Inc.'s Motion and Memorandum for Relief from Magistrate's Order.

Pursuant to Magistrate Order dated January 7, 1991, a hearing was held on January 15, 1991, on "Plaintiff's Motion to Strike Affidavit of Daniel K. Schaffner and Renewed Motion for Sanctions (Dkt. 163), filed December 19, 1990." Following the January 15, 1991 hearing, Magistrate Elizabeth A. Jenkins entered an Order dated January 15, 1991.

. . .

(o) FDIC, on illusion of a discovery issue it created, wrongfully seeks dispositive relief pursuant to pending Motion for Rule 37(b) Sanctions; said Motion, if successful, would avoid accountability for a claim it is unable to support as documented in FDIC's response to pending Motion for Summary Judgment.

(p) This motion is filed in recognition of more than one hundred thousand cases, heretofore noted of record, that were projected as forthcoming before the state and federal courts by the end of 1990; that the issues in this case, the resolution of which appear to directly address unnecessary litigious continuation of litigation by federal regulators, clearly reflect conduct and present the material issues of significant interest in multitude of cases before the courts.

(q) Plaintiff, and its counsel, continued to force Al-Kelani, Inc. to defend this claim without

> access to its "additional collateral." Said collateral, known to be only assets available to fund effective defense before this Court; notwithstanding the fact that Plaintiff held documentation that establish invalidity of Complaint and lack of any basis in fact or law.

Appellants would respectfully submit the above quoted text reflects instances in one isolated memorandum, amidst eleven volumes of pleadings, where issues of FDIC's circumvention of Rule 37 would stand as one against a multitude of instances far too numerous for individualized reference in this brief. The vast number of instances where Rule 37 issues appear in the case record should fully document the scope and magnitude of the threat to the Administration of Justice. Likewise, this Court's plenary review shall demand de novo findings addressing FDIC's post appeal litigation conduct in context of sound judicial interest in maintaining the integrity of the appellate process.

D. **FDIC is estopped to justify its post appeal litigation conduct by its own actions.**

In Memorandum of Law in Opposition to the Federal Deposit Insurance Corporation's Motion for Summary Judgment of Foreclosure and for Clarification of Order Striking Defendant's Defenses (R9-250-9), FDIC was placed upon actual notice of unresolved issues of law by the following:

> A question of law, heretofore unaddressed by this Court, compels a threshold finding that the integrated mortgage documentation is subject to FDIC's interpretation that Audubon Federal Savings and Loan Association satisfied all conditions precedent to the filing of the present foreclosure action. See Transcript of 10/7/91 Status Conference at page 4 (Docket Number 223). District Judge, Harvey E. Schlesinger, specifically noted at lines 6-7 on page 4:

"Well, you've got the breach of contract problems." This statement followed and addressed Plaintiff's counsel's statement that "FDIC's position on this is it's not a complex case; it's a mortgage foreclosure."

Plaintiff's counsel responded to Judge Schlesinger's notation of the "breach of contract problems" by saying at lines 8-16:

> MR. SIVYER: Right. We filed a motion to strike all of his affirmative defenses back in 1989 which hasn't been ruled on. But with respect to the discovery motions, there are about four different motions that Mr. Schaffner has filed for sanctions for various reasons. And quite honestly, Your Honor, there's never been an order compelling anything. I don't know how any of the sanctions could be granted. We're ready, willing and able to proceed. And if he has other discovery, we're ready to comply with it.

It is well established that FDIC cannot justify its adversarial position or litigation conduct upon an argument clearly refuted by express articulation of the document. Likewise FDIC cannot justify its adversarial position upon argument expressly denied in the articulation of the order upon which is founded its justification. Appellants would respectfully submit that the articulation of the lower court discovery rulings clearly indicated reliance upon the pleadings, Rules of Evidence, and statutory authority applicable to the motion proceedings when said issues were raised sub justice. Likewise, the lower court's entry of Summary Judgment

(R10-279) and Final Judgment of Foreclosure (R10-286) clearly reflects reliance upon prior Order (R8-232). FDIC cannot deny knowledge of the law applicable to the statutes and cases its cites as authority in motion proceedings.

This Court is charged to find specious and justified to impute fraudulent intent where FDIC's argument is unreasonable on its face or where no reasonable person could maintain honest belief in such position after reading the document or order in question. FDIC's post appeal motion conduct imputes blatant attempt to avoid informed resolution on appeal of genuine issues of FDIC's willful, malicious and fraudulent misapplication of statutory authority and "bad faith" circumvention of established Rules of Court.
This Court further stated in Steward, supra, uniquely applicable reasoning as follows:

> When an agreement's terms are clear and certain, the court has the duty to determine the meaning of the agreement. The fact that the parties adopt conflicting interpretations of the contract in the throes of litigation does not create ambiguity where none exists. (citations of authorities omitted)

This Court has responsibility for de novo consideration of law applicable to the unambiguous facts disclosed upon plenary review of the record; and, the issues of law and unambiguous facts disclosed upon this Court's plenary review shall determine if de novo findings are demanded by this Court declaring that FDIC knowingly, willfully and with fraudulent intent sought and secured favorable rulings through circumvention and misapplication of unique statutory authority and Rules of the Court. This Court is charged to resolve de novo and enter such findings deemed necessary and reasonable to fully address the scope and magnitude of the threat to the Administration of Justice found within the four corners of the case record on appeal. This Court is charged to resolve de novo whether the case record documents a threat to the continuing integrity of the

appellate process. (See Infra, Deterrence Sanctions, at Issue IV.

FDIC's post appeal motion conduct documents contumacious "willful blindness" to erroneous findings of fact and conclusions of law the district court judges and their magistrate were required to accord FDIC as a duly appointed federal receiver. FDIC's post appeal motion proceedings, both sub justice and before this Court, demands de novo findings addressing elusive questions of FDIC's intent. In addressing a "substantive due process" issue this Court in McKinney v. Pate, 985 F.2d 1502, 1505 (11th Cir. 1993) noted:

> . . . It is well settled that such claims state "a substantive due process violation - deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis." (citations omitted) The distinguishing feature of such claims, in contrast to procedural due process claims, is "that certain governmental conduct would remain unjustified even if it were accompanied by the most stringent of procedural safeguards." (citations omitted)

Plenary review shall expose FDIC's post appeal motion proceedings seeking Deficiency Judgment sub justice while contemporaneously seeking dismissal before this Court. FDIC's Answer Brief filed in appeal 92-2819 evidences "willful blindness" to genuine issues raised by its Complaint, Answer and Discovery Responses. It is respectfully submitted that FDIC's post appeal motion proceedings compel de novo findings of a knowing fraudulent attempt to consummate its "deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis." Ibid.

ISSUE II
RULE 60(b) FRCP DEMANDS SWIFT AND FINAL APPELLATE RESOLUTION AGAINST FDIC

The full text of Rule 60(b) FRCP provides as follows:

Rule 60. Relief from Judgment or Order

. . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the

> nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
> (Amended March 19, 1948; Oct. 20, 1949; Aug. 1, 1987)

This Court is charged to resolve whether FDIC secured the Deficiency Judgment (R11-321) in violation of the constraints imposed by Rule 60(b) Ibid. Appellants/Defendants specifically noted Rule 60(b) FRCP in their Objections to Report and Recommendation by Magistrate Jenkins dated September 3, 1993 (R11-309).

This Court's authority to grant relief under Rule 60(b) is beyond question in this case. The inherent powers of the Judiciary, whether district, appellate or the Supreme Court of the United States, simply cannot be disputed. The foregoing has been established by the Supreme Court in Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956), when the Supreme Court refused to make a determination on the merits of a case and remanded upon the basis of allegations of false testimony, stating:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. It's observance is one of our proudest boasts. This Court is charged with supervisory functions in relations to proceedings in the Federal Courts. See, McNabb v. United States, 318 U.S. 332. Therefore, fastidious regard for the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

Id. at 124. The Supreme Court specifically noted there was no choice but to demand such disposition "because the fair administration of justice require[d] it." Id. at 124-25. The egregious nature of FDIC's post appeal motion conduct upon

plenary review, shall deny FDIC any remand for further proceedings upon the merits as was deemed proper in Communist Party.

In Phipps v Blakeney, 8 F.3d 788, 791 (11th Cir. 1993) this Court affirmed lower court dismissal as proper discovery sanction, stating:

> . . . But some cases speak for themselves and are clear enough without the district court adding a section to its opinion to explain why lesser sanctions were not used. This case is one of those cases. See National Hockey League, 427 U.S. at 640, 96 S.Ct. at 2779; Bonaventure, 593 F.2d 625. A review of the record in this case shows that there was no abuse of discretion.

FDIC's successful strategy of non-disclosure and obfuscation avoided proper consideration of facts and law that plenary review shall render patently clear and allow this Court to resolve with finality all issues raised in this third appeal.

A. Established case precedent of this Court provide independent basis for relief and support relief under Rule 60(b) FRCP.

The prior Orders and Judgments upon which FDIC necessarily must base its right to the Deficiency Judgment (R11-321) impute knowing fraud and improper purpose to FDIC's post appeal motion proceedings. The instant case raises issues substantially identical to those addressed by this Court in Golden Door Jewelry v. Lloyds Underwriters, 8 F.3d 760, 769 (11th Cir. 1993), stating:

> . . . It is apparent from the district court's Omnibus Order that it did not address the issues consignors have noted for appeal. The district court noted that "[t]he underlying issues are rendered moot by the terms of the ruling contained herein and in the Court's

> Order of October 11, 1990." Golden Door II, 758 F.Supp. at 723. . . .
>
> This decision, however, makes these issues once again relevant. Rather than addressing these issues on a blank slate, this court finds it appropriate to remand these questions to the district court for further proceedings as necessary.

The above authority provides clear precedent and notice to FDIC that appellate issues that were rendered "moot" or "precluded" by statutory authority the lower court was required to accord Plaintiff (FDIC) sub justice shall not, in itself, justify the validity of said lower court "rulings." This Court's de novo resolution of significant issues in appeal 92-2819 shall control in resolving whether FDIC knowingly and with fraudulent purpose allowed its attorney to secure Deficiency Judgment (R11-321).

The integrity and validity of lower court's rulings that were pending before this Court prior to FDIC's post appeal motion proceedings and entry of the Deficiency Judgment (R11-321) represent critical issues that are controlling upon issues of fraudulent intent and improper motive raised by FDIC's securing Deficiency Judgment, subject of the instant third appeal. It would appear that the issues presently before this Court are analogous to those addressed in Wouters v. Martin County, Fla., 9 F.3d 924, 930-31, 934 (11th Cir. 1993).

The district court granted defendant's motion for summary judgment, rendering moot the good faith issue raised by defendant. Wouters, 793 F.Supp. at 314. Because we vacate the order granting summary judgment, the good faith issue remains open on remand.

> . . .
>
> . . . The trial court apparently deemed the pre-suit agency structure, in which plaintiffs and firefighters were in separate divisions, determinative in deciding whether to apply section 553.215(a). . . .

. . .

> Dismissal is warranted only where noncompliance with discovery orders is due to willful or bad faith disregard for those orders. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1556 (11th Cir.), cert. denied, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). While our review is sharply limited to search for an abuse of discretion and determination that the trial court's findings are supported by the record, we will find abuse of discretion if less drastic sanctions would suffice. Malautea, 987 F.2d at 1542; Navarro v. Cohan, 856 F.2d 141, 142 (11th Cir. 1988); Pesaplastic, 799 F.2d at 1519.

It is deemed significant that all issues set forth at id. are subject to this Court's de novo resolution in appeal 92-2819 and critical to this Court's analysis and de novo determinations raised by FDIC's post appeal motion conduct, both sub justice and before this Court. The issues in Wouters which compelled this Court to "REVERSE," "VACATE" and "REMAND" id. at 934, shall in this third appeal demand full and final relief before this Court.

This Court's case precedent denies FDIC escaping detection and avoiding accountability for its contumacious continuation, post appeal, securing the Deficiency Judgment (R11-321) upon the product of undetected fraud, misapplication of unique statutory authority, and upon knowing product of Defendants' substantive constitutional rights under the Fifth, Sixth and Seventh Amendments. This Court's case precedent has addressed "elusive factual questions" which FDIC's post appeal motion proceedings, if successful, would forever bury under the "paper mountain" created by its own "bad faith" litigation conduct. In Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 921 (11th Cir. 1993), this Court specifically addressed "elusive factual questions" in resolving issue of pretext, stating:

> . . . Accordingly, the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the "elusive factual question" of intentional discrimination. Id. at 256, 101 S.Ct. at 1095.
>
> . . .
>
> [13,14] The burden to avoid summary judgment is not to show by a preponderance of the evidence that the reasons stated were pretext. . . .

This Court in Hairston, id. at 921, "REVERSE[d] the District Court's entry of summary judgment . . . and REMAND[ed] this case to the District Court for trial." FDIC's post appeal conduct shall demand this Court's de novo findings involving "elusive factual question[s]" of FDIC's fraudulent intent, improper purpose and knowing abridgement of fundamental constitutional rights. It is respectfully submitted that FDIC's post appeal litigation conduct evidences disdain to this Court's ability to pierce the product of its artifice and deceit and articulate an opinion sustaining de novo findings of "fraud" or "improper purpose" sufficient to predicate deterrence sanctions at a magnitude beyond that which FDIC already faced when it authorized the post appeal conduct, subject of this third appeal.

The statute upon which the lower court predicated entry of the Deficiency Judgment (R11-321) leaves no question as to the interpretation. Application of a Florida Statute is not a rare instance in the federal district courts or review of same by this Court. In Scheurenbrand v. Wood Gundy Corp., 8 F.2d 1547, 1552 (11th Cir. 1993), this Court, in resolving statutory issue noted:

> . . . Damages under this statute are automatic; . . . "[b]ecause . . . section 517.211 contains an express civil liability provision . . . They need only follow the clear language of the statute."

The precise analysis and statutory construction which compelled appellate affirmation of the lower court's rulings in Scheurenbrand, applied to the unequivocal facts, subject to this Court's plenary review, shall demand de novo findings properly addressing erroneous findings of fact and conclusions of law which were insidiously avoided sub justice. This third appeal demands FDIC's acknowledgement of applicability and response to statutes and Rules of Court the lower court was required, as a matter of law, to accord FDIC in resolving post appeal motion proceedings now before this Court. FDIC cannot argue informed consideration of misapplication of statutes and "bad faith" abuse of Rules of Court in direct contradiction of the lower court's orders.

The FDIC employs hyper-technical arguments involving isolated factual issues and legal issues while maintaining "willful blindness" to the binding legal implications required to be accorded its Complaint (R1-3), Answer to Counterclaim (R3-72) and repeated evasive discovery responses to Request for Admissions which was subject to multiple lower court orders, to which FDIC skillfully avoided truthful responses, and which contumaciously occasioned misapplication of the very law upon which this Court must affirm or deny the Deficiency Judgment (R11-321). FDIC's discovery conduct from the date of its substitution as "party plaintiff," documents deliberate obfuscation and intent to deceive the lower court. FDIC's intent, motive and purpose in securing the Deficiency Judgment would appear to rest upon the validity of previously entered Orders and Judgments, sub justice, said previous "Orders and Judgments" themselves pending before this Court in appeal 92-2819 and awaiting this Court's de novo findings upon plenary review of the identical voluminous case record, subject of this third appeal.

The lower court specifically entered the Deficiency Judgment (R11-321) upon express statutory mandate deemed required pursuant to Florida Statute 702.06. See Pruett v. Choctaw County, ALA, 9 F.3d 96, 97 (11th Cir. 1993), stating:

> Rather, the district court determined that there was no cause to revisit its previously entered order, and it therefore refused to re-examine that prior ruling. Moreover, the very style of the motion itself, "Motion to Reconsider," suggests that this motion was not a renewed motion for summary judgment.
>
> (footnote omitted)

FDIC's post motion conduct would have this Court affirm upon procedural device, determine the significant issues raised in the instant case, and thereby escape analysis which this Court exercised in Pruett, id. FDIC's post appeal motion tactics are evidentiary and properly subject to this Court's imputing knowledge, fraud and improper purpose as justification for entry of such de novo findings this Court deems necessary and proper to resolve genuine issues raised in this third appeal.

In Llope v. Federal Sav. and Loan Ins., 558 So.2d 435, 436-437 (Fla.App. 4 Dist 1990), the state court noted:

> . . .
>
> The trial court, relying on D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 35 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956, reh'g denied, 315 U.S. 830, 62 S.Ct. 910, 86 L.Ed. 1224 (1942), and its progeny, granted the final summary judgment, pretermitting the appellant from maintaining an affirmative defense based on estoppel.
>
> . . .
>
> In the instant case the agreement which the appellant claims was performed and relied upon by Sunrise may give rise, as a matter of law, to a defense of estoppel if established by the facts at trial.
>
> Consequently, the final summary judgment must be reversed and the case remanded for a trial on its merits.

The binding case precedent of this Court and the matters in Llope, ibid., identify necessity for the highest level of appellate scrutiny to avoid that which binding case precedent compels to ensure fundamental due process.

FDIC's post appeal motions proceedings and repeated attempts to secure dismissal before this Court are subject to the constraints and duties demanded under the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure and the Eleventh Circuit Rules. This author respectfully submits that FDIC blatantly and contumaciously continues fraudulent and constitutionally repugnant litigation conduct, post appeal, seeking to escape accountability for known and well-documented litigation misconduct evidenced in the voluminous case record on appeal; and, misconduct which FDIC is charged with full knowledge went undetected upon "bad faith" circumvention of Rules of Court and "misapplication" of unique statutory authority through insidious preclusion of factual documentation upon separate and distinct statutory authority.

FDIC, upon the product of its "artifice and deceit" would have this Court overrule upon "procedural fiat" this Court's case precedent established in Baumann v. Savers Federal Sav. & Loan Assoc., 934 F.2d 1506, 1517 (11th Cir. 1991), stating:

> . . . As discussed above, much of the testimony at trial concerned obligations outside the scope of the written documents. Other evidence at trial, however, focused on whether Savers Federal had breached the terms of the written documents, or had failed to perform them in good faith. As the Seventh Circuit pointed out in Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir.1981), the D'Oench doctrine does not protect federal agencies where bilateral obligations are evident on the face of the documents at issue. Id. at 746-47. Application of D'Oench in such circumstances would not further the purposes of the doctrine. Bank examiners cannot be misled by

> documents that evidence the true obligations of the parties. . . .

This Court is charged to take judicial notice of those facts and conclusions of law that are necessary and upon which the Deficiency Judgment (R11-321) must stand or fail. The post appeal motion conduct, subject of this third appeal, must of necessity resolve de novo upon plenary review the true facts and proper conclusions of law applicable to each and every ruling upon which the Deficiency Judgment must stand.

It is well established that this Court's analysis of the case record on appeal must view the lower court rulings in the context of the applicable law and evidentiary constraints that were present when said lower court rulings were rendered sub justice. This Court must resolve de novo if the facts and law applicable to the lower court rulings are in fact and law consistent with FDIC's argument and implications being asserted on appeal. In Baumann, at 1518, this Court further stated:

> . . . There were also disputes concerning whether Savers Federal improperly failed to release its lien on part of the property in accordance with the loan documents. A jury conceivably could find that Savers Federal breached its obligations under the agreement or breached its duty to perform its obligations in good faith. So long as the jury's findings were not tainted by evidence of obligations not found in the loan documents, these findings could dictate a result in favor of Baumann. . . .

Once again, this author finds FDIC's post appeal motion conduct, both sub justice and before this Court, of critical evidentiary significance upon genuine issues raised in this third appeal as to FDIC's fraudulent intent, improper purpose, knowing misapplication of unique statutory authority, knowing avoidance of genuine issues involving abridgement

of Defendants' substantive constitutional rights under the Fifth, Sixth and Seventh Amendments under the Constitution of the United States.

B. **FDIC is accountable under Rule 60(b) for its failure to exercise proper supervisory control to ensure due process.**

The lower court record is replete with admonitions of FDIC's countenance of litigious trial strategy involving misapplication of unique statutory authority according FDIC preferences and presumptions which denied informed resolution upon the true facts and applicable law the lower court was required to accord FDIC. This Court can take judicial notice of its own records and the August 26, 1993 letter to the Office of the Inspector General of FDIC. Likewise, this Court can take judicial notice of the factual and legal issues identified in the briefs that were on file with the Clerk of this Court in appeal 92-2819 when FDIC proceeded to secure the Deficiency Judgment (R11-321), subject of this third appeal.

This Court has recently reviewed a lower court's entry of default and addressed the responsibilities and duties of both the party litigants and their attorneys in proceedings before the federal district court. In Florida Physician's Ins. Co. Inc. v. Ehlers, 8 F.3d 780, 784 (11th Cir. 1993), this Court noted:

> . . . lack of diligence is easily analogized to a company's failure to establish minimal procedural safeguards. Ehlers, as a defendant in a suit alleging millions of dollars in damages, had a duty to act with some diligence to ensure that his attorney was protecting his interests. He did not do so, and we find that the district court did not abuse its discretion in finding that Ehlers did not establish good cause for his default.

The Court, Id. at 784-785, further noted:

> We conclude that the district court did not abuse its discretion in finding that Ehlers had not established good cause for his default and in denying Ehler's Rule 60(b) motion, and that adequate notice was sent to Ehlers. We AFFIRM.

Defendants/Appellants would respectfully submit that FDIC's post appeal motion conduct would call forth the precise and sound reasoning of Ehlers demands application to the converse situation presented in the instant case of FDIC having failed to exercise minimal supervisory control, after notice, and now stand before this Court having consummated a taking of Defendants/Appellants' property interests in direct violation of constitutional prohibitions under the Fifth, Sixth and Seventh Amendments.

This Court is fully cognizant of the intended curative powers afforded under Rule 60(b) FRCP. An in-depth analysis of Rule 60(b) was recently required by a panel of this Court in Hertz Corp. v. Alamo Rent-A-Car,Inc., 16 F.3d 1126 (11th Cir. 1994). It is respectfully submitted that this Court's extensive analysis in its "II. DISCUSSION" Id. at 1128-1133 provides binding precedent for according Defendants/Appellants relief under Rule 60(b)(4).

The genuine issues raised by FDIC's post appeal conduct implicate litigious trial conduct, unresolved in heated adversarial motion proceedings sub justice, and FDIC's filing repeated procedural motions before this Court seeking dismissal of appeal 92-2819 and dismissal of this third appeal 93-3492. It would appear self evident that upon this Court finding in favor of Defendants/Appellants upon the unresolved issues pending before this Court that sound interest in the Administration of Justice would demand de novo findings of willful, wanton, malicious and arbitrary litigation misconduct that were knowingly foisted upon the Honorable Justices of the Eleventh Circuit Court of Appeals. It would appear axiomatic that this Court would have the inherent authority to utilize all applicable provisions under Rule 60(b) in order to maintain the integrity of the appellate

process.

A recent case before the Sixth Circuit Court of Appeals documents the issues raised by FDIC's contumacious conduct, sub justice, is not an isolated instance, and in fact would appear to support this author's belief that pervasive litigation misconduct by government-cloaked agents are now threatening the Article III Court's ability to ensure the Administration of Justice. This belief is reinforced by the articulation of the Sixth Circuit Court in Demjanjuk v. Petrovsky, 10 F.3d 338, 352-354 (6th Cir. 1993), said Court specifically noting:

> Fraud on the court is a somewhat nebulous concept usually discussed in civil cases. No court system can function without safeguards against actions that interfere with its administration of justice. This concern must be balanced against the necessity for finality of court judgments; thus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled decrees.
>
> . . .
>
> When the party is the United States, acting through the Department of Justice, the distinction between client and attorney actions becomes meaningless. The Department acts only through its attorneys. Although there are cases holding that a "plan or scheme" must exist in order to find fraud on the court, we agree with Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not required in a case such as this. Reckless disregard for the truth is sufficient.
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> . . .
>
> . . . . We believe the OSI attorneys had a constitutional duty to produce "all evidence favorable to an accused [Demjanjuk]," which the Special Master found he had requested and that was "material . . . to

> guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87, 83 S.Ct. at 1196.
>
> Thus, we hold that the OSI attorney acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.

The Eleventh Circuit Court of Appeals is charged to resolve de novo whether FDIC is charged only with "reckless disregard for the truth" Ibid. or must be charged with "willful, wanton, malicious" and knowingly seeking to consummate a fraud upon the Eleventh Circuit. It shall be for this Court to resolve if the integrity of the Article III Courts has been knowingly challenged by the FDIC.

ISSUE III
WHETHER THE RECORD ON APPEAL DEMANDS DE NOVO FINDINGS THAT FDIC KNOWINGLY SECURED THE DEFICIENCY JUDGMENT (R11-321) THROUGH SUCCESSFUL ABRIDGEMENT OF DEFENDANTS/COUNTER-PLAINTIFFS' CONSTITUTIONAL RIGHTS

FDIC post appeal motion proceedings before this Court, if successful, would have made legitimate its non-responsive Answer Brief filed in appeal 92-2819. It is "willful blindness" to the legal significance the Court was required to accord FDIC's Complaint, Discovery Responses and Answer which demands this Court imputing fraud, improper purpose and maliciousness to FDIC's post appeal proceedings. It is blatant fraud for FDIC to argue on appeal facts in support of

sustaining orders and judgements secured before the lower court upon application of 12 U.S.C. §1823(e), which precluded the lower court's consideration of the very facts FDIC would have this Court now predicate its affirmance.

It is specious and imputes fraudulent intent for FDIC to exercise "willful blindness" to the wrongful preclusion occasioned by Court rules and unique statutory authority which FDIC and its attorneys are charged to understand. FDIC's ignorance is belied by the facts disclosed in the twenty-volume case record subject of this Court's plenary review. This Court's plenary review shall demand de novo findings upon all questions of law involving misapplication of statutory authority and "bad faith" misuse of Rules of Court. Compelling Public and Judicial interests in the Administration of Justice necessarily demand this Court's de novo findings upon each and every issue involving Rules of Court and statutory authority appearing in the case record.

The requirements for de novo review elevates the scope and magnitude of this Court's charged responsibility to resolve with finality FDIC's post appeal motion proceedings, sub justice, which consummated a taking of Defendants' constitutionally protected property rights under the Fifth Amendment. The Fifth Amendment Rights and threat to the Administration of Justice is further magnified by actual notice to FDIC that its post appeal deficiency judgment would further constitute abridgement of Sixth and Seventh Amendment Rights of the Defendants' sub justice.

FDIC's "willful blindness" and litigation misconduct turns statutory authority and Rules of Court, intended to ensure Fundamental Due Process for all litigants appearing before the Judiciary, into a weapon beyond control of Congress or the Judiciary. This case documents that "bad faith" discovery practices, misapplication of statutory authority and insidious abuse of unique "presumptions" accorded government agents cloaked with agency status. This case documents that federal district courts are helpless to protect individual litigant's Constitutional Rights when government agents are willing or able to pursue appellate

litigation strategy of "willful blindness" to clear statutory mandates of Congress and blatantly attempt to paper over "bad faith" circumvention of the Rules of Court.

The Deficiency Judgment (R11-321) consummated a final taking by FDIC of Defendant/Appellants real property additional collateral assets. The significance of constitutionally protected real property rights are well established and fully recognized by Supreme Court decision. Public and judicial interests in the sanctity of real property rights were specifically addressed and fully evidenced in a recent forfeiture case before the Supreme Court in United States v. James Daniel Good Real Property et al., 114 S.Ct. 492, 505, 126 L. Ed. 2d 490, 508 (1993), Justice Kennedy speaking for the majority noting:

> The constitutional limitations we enforce in this case apply to real property in general, not simply to residences. That said, the case before us well illustrates an essential principle: Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it.

The full significance of constitutionally protected real property interests are fully evidenced by Justice Thomas, in his articulation concurring in part and dissenting in part, id. at 114 S. Ct. 515, 126 L. Ed. 2d 521, specifically noting:

> Like the majority, I believe that "[i]ndividual freedom finds tangible expression in property rights." Ante, at 18. In my view, as the Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property. Although I disagree with the outcome reached by the Court, I am sympathetic to its focus on the protection of property

> rights - rights that are central to our heritage. Cf. Payton v. New York, 445 U.S. 573, 601 (1980) ("[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"); Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P.1765) ("The great end, for which men entered into society, was to secure their property").

Defendant/Appellants would respectfully submit the FDIC is charged with full knowledge that the post appeal motion conduct implicates deprivation of substantive real property rights protected under the Fifth Amendment. In Elder v. Holloway, 114 S.Ct. 1019, 1023, 510 US __, 127 L Ed 2d 344, 351 (1994), Justice Ginsburg in delivering the opinion for the Court, noted:

> [3] Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." That question of law, like the generality of such questions, must be resolved de novo on appeal. A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." (citations omitted)

The present case is uniquely suited to the application of Justice Ginsburg's analysis, Ibid. It would be an invitation for grievous agency corruption of the appellate process if FDIC would only be subjected to appellate scrutiny of issues that Appellants' counsel could articulate after years of litigious conduct designed to exhaust and render issues beyond said counsel's ability to clarify for resolution.

It would appear consistent with Justice Ginsburg's comments in Elder, ibid., that this Court recognize the objectionable post appeal motion conduct implicates denying

Defendant/Appellants' ability to properly focus resources and initiate such motion proceedings and independent actions that but for the actions of FDIC would have been fully and properly placed at issue before this Court. This Court's case precedent in Baumann, supra, would seem to confirm this Court's prior recognition of the recent language of Justice Ginsburg in the Elder case. The foregoing would seem applicable to this Court's ability to impute fraudulent motive and malicious purpose in FDIC's seeking to overload Defendants/ Appellants' resources and avoid independent action or counterclaim asserting a RICO action against the FDIC. It should not be left unobserved that FDIC's post appeal motion conduct, sub justice and before this Court, likewise is susceptible to de novo findings that FDIC's post appeal conduct denied Appellants/Defendants' ability to fully utilize procedures available under the Federal Rules of Appellate Procedure. See National Organization for Women, Inc. v. Scheidler, 114 S.Ct. 798, 805, 510 US __, 127 L Ed 2d 99, 110 (1994). Justice Renquist, for the Court, noted:

> . . . The Court of Appeals for the Second Circuit decided that the sort of activity thus condemned required an economic motive.
>
> We do not think this is so. Respondents and the two courts of appeals, we think, overlook the fact that predicate acts, such as the alleged extortion, may not benefit the protestors financially but still may drain money from the economy by harming businesses such as the clinics which are petitioners in this case.

The FDIC's countenance of the post appeal 92-2819 motion strategy and likewise its countenance of the litigation conduct sub justice, subject matter of appeal 92-2819, clearly implicate unresolved issues subject to this Court's de novo findings, which upon affirmance of Defendants' allegations and interpretations maintained sub justice, would clearly form proper basis and predicate for maintaining RICO action against FDIC.

The significance of the foregoing implications occasioned by FDIC's litigation conduct, and necessity for this Court to ensure absolute compliance with statutory mandates and "good faith" application by government-cloaked agents of both statutes and Rules of Court is most evident in the recent Supreme Court decision in F.D.I.C. v. Meyer, 114 S.Ct. 996, 1006, 510 U.S. __, 127 L Ed 2d 308, 323 (1994). Justice Thomas in delivering the opinion for a unanimous Court, noted:

> . . . If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government. . . . We leave it to Congress to weigh the implications of such a significant expansion of Government liability. (footnotes and citations omitted)

It is respectfully submitted that FDIC's litigation conduct subject of this Court's de novo findings upon plenary review shall establish an unequivocal threat to the Administration of Justice, Separation of Powers Doctrine and Fundamental Constitutional Rights. This Court's charged responsibility as Guardian of the Constitution and its inherent authority in equity to maintain the Administration of Justice shall demand such de novo findings and appellate mandate to reasonably ensure neither FDIC nor any other government agency countenances or encourages "willful blindness" to established and well known responsibilities necessary to comply with "due process." (See Infra. at Issue IV, addressing reasonable and necessary sanctions.)

FDIC, by its actions and omissions, would insidiously usurp what our Nation and its People have more than once stood on the brink of nuclear war to Preserve Inviolate, the Priceless Constitutional Rights accorded the Individual under our system of justice. Only through absolute compliance with clear statutory mandates, which FDIC blatantly employs "willful blindness" to avoid, shall enhanced statutory

preferences accorded FDIC and other federal agencies satisfy Fundamental Due Process. It is patently clear that without ability to demand absolute compliance of clear statutory mandates and "good faith" utilization of unique preferences accorded FDIC, the integrity of the Article III Courts would require declaring the entire administrative bureaucracy unconstitutional on its face.

The analysis exercised by this Court in Baumann, supra., is deemed of particular significance on whether this Court should impute fraud and improper purpose to FDIC's post appeal motion conduct. The clear notice by the Honorable Harvey E. Schlesinger addressing "breach of contract" issues in open court (R12-223-4) and FDIC's counsel acknowledging said issues as "Right" (R12-223-4) would appear most relevant. Appellants/Defendants respectfully submit that FDIC's post appeal motion conduct evidences intentional fraud sub justice. FDIC and its attorney when it sought Summary Judgment upon a clarification of prior Order committed blatant fraud upon the Honorable Anne C. Conway, the third successive federal district judge, and by procedural device, avoided the "breach of contract" issues recognized by Judge Schlesinger.

FDIC's post appeal motions filed before the Eleventh Circuit Court of Appeals in appeal 92-2819 and in the instant case seeking dismissal pursuant to facially valid procedural motions shall compel this Court's entry of de novo findings that said motions constitute malicious, willful and wanton conduct. This Court is charged as Guardian of the Constitution to enter de novo findings that FDIC's post appeal motion conduct documents a knowing and fraudulent intent to consummate through appeal its abridgement of Defendants' Fifth, Sixth and Seventh Amendment Rights. It is contumacious and evidentiary of FDIC's fraudulent strategy of consummating its fraud through appeal for FDIC to avoid responding to critical issues of misapplication of 12 U.S.C. §1823(e) and the D'Oench Duhme case precedent by foisting responsive argument in its Answer Brief in appeal 92-2819 upon factual grounds clearly precluded under §1823(e).

FDIC is charged with full knowledge and is susceptible to this Court imputing "bad faith" and fraudulent motive in FDIC's seeking to justify its position on appeal upon facts which were clearly considered as "moot" and not considered by the lower court. FDIC cannot avoid de novo findings of "willful, wanton and malicious" litigation strategy by foisting self-serving interpretations of lower court orders in direct conflict with the clear articulation set forth in said orders.

This Court is charged to resolve de novo and enter such necessary findings to address genuine issues raised by FDIC's post appeal motion conduct implicating a fully noticed and known threat to the Separation of Powers Doctrine. This Court is fully cognizant that it would be unrealistic to expect a total revision of the Appellate Procedures Act which limits judicial review in cases arising out of the administrative forum. In resolving the instant case, this Court is charged to address FDIC's conduct and ensure, if possible, an opinion and mandate to resolve with finality litigation conduct that threatens this Court's ability to maintain and preserve, inviolate, the Administration of Justice. See Demjanjuk at 352, stating that "No court system can function without safeguards against actions that interfere with its administration of justice." FDIC's conduct, involving Defendants' property interests, pose a far greater threat than the personal liberty interest at stake in the Demjanjuk case. The safeguards and availability of federal public defenders to be appointed in appropriate cases, utilized by the Sixth Circuit Court in Demjanjuk, has no precedent or like safeguard when constitutionally protected property interests are extorted by government-cloaked agents and agencies (FDIC herein) more than willing to employ or acquiesce in "willful blindness" to the statutes and court rules. This case and the genuine issues before this Court now documents the Constitution has ceased to have any meaning, whatsoever, when real property rights and good faith compliance with Rules of Court come into conflict with FDIC's acquiescence of a "win at any cost" attitude fully evidenced and

documented in the voluminous case record demanding plenary review in the instant case.

ISSUE IV
WHETHER THE RECORD ON APPEAL DEMANDS DE NOVO FINDINGS THAT FDIC HAS ACCOUNTABILITY FOR IMPOSITIONS OF EXTRAORDINARY SANCTIONS UNDER RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, AND PURSUANT TO THIS COURT'S INHERENT AUTHORITY IN EQUITY

In Appellants' Initial Brief, Section V, Issue III, pages 47-48, said notice of genuine Rule 11 issue, subject to this Court's de novo findings, was submitted as follows:

> The Eleventh Circuit has clearly established standards applicable to the imposition of sanctions and circumstances under which sanctions must be imposed. In Donaldson v. Clark, 819 F.2d 1551, 1555-56 (11th Cir. 1987), the Court, in an en banc decision, noted:
>
> > Fed.R.Civ.P. 11. This language "stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." Advisory Committee Note. Rule 11 as amended is intended to "reduce frivolous claims, defenses or motions" and to deter "costly meritless maneuvers," thus avoiding unnecessary delay and expense in litigation. The Appellants submit that FDIC and its predecessor, FSLIC, has drawn a road map which requires finding Rule 11 Sanctions and reasonable deterrence sanctions must be imposed against Plaintiff. The Complaint, subject of this appeal, set forth specific

> allegations, charged with presumptions of truthfulness and susceptible to misapplication of statutory authority, while in possession of documentation that denied truthfulness of the allegations and inapplicability of the statutory authority the lower court was required to accord Plaintiff.

This Court should take judicial notice that FDIC was placed upon full knowledge and notice that its litigation conduct sub justice called forth extraordinary deterrence sanctions specifically addressed in Appellants' Initial Brief, pages 47-53, filed before this Court in appeal 92-2819.

A. **Established Case Precedent Demands Imposition of Deterrence Sanctions.**

The noticeable absence of any Universities, Politicians or Attorneys seeking amicus participation, notwithstanding potential multi-billion dollar deterrence sanctions are authorized under clear case precedent and inherent authority in equity, now demands this Court's entry of such de novo findings that shall sustain the Thirty Billion Dollar deterrence sanction FDIC willingly and knowingly placed at risk when it contumaciously sought and secured the post-appeal Judgment (R11-321) upon product of fraudulent and Constitutionally repugnant litigation conduct.

The United States Supreme Court has clarified the Standard of Review applicable to appellate resolution of Rule 11 Sanctions. In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed. 2d 359 (1990), the Court noted:

> . . . an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. . . .

Appellants/Defendants would respectfully submit the above quote is uniquely applicable to this Court's resolution of appeal 92-2819 and implicates reckless disregard for FDIC's self-serving pleadings and discovery responses having occasioned the lower court to "base its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Ibid. Justice Stevens' comments concurring in part and dissenting in part are uniquely applicable to FDIC's position in this third appeal, wherein he stated:

> . . . When a plaintiff persists in the prosecution of a meritless complaint, however, or the defendant joins issue by filing an answer or motion for summary judgment, Rule 11 has a proper role to play. The prosecution of baseless lawsuits and the filing of frivolous papers are matters of legitimate concern to the federal courts and are abuses that Rule 11 was designed to deter.

Id. 496 U.S. 411, 110 L. Ed. 2d 385. This author perceives this Court's plenary review shall disclose litigation misconduct of an unthinkable scope and magnitude distinguishing this third appeal and calling forth an appellate mandate far beyond the limited parameters of Rule 11. However, the clarity of the lower court case record evidencing demand for appellate de novo findings that Rule 11 Sanctions are demanded shall assist and document necessity for this Court's exercise of its inherent powers in equity to structure and issue a mandate to deter conduct which, if unabated, threatens the integrity of the appellate process and fundamental ability of the Article III Courts to ensure the Administration of Justice.

The standards to which parties and their attorneys must comply were addressed by the Supreme Court in Business Guides v. Chromatic Communications Ent., 111 S.Ct. 922, 933, 112 L.Ed.2d 1140, 1158-59 (1991), the Court noting:

> . . . Many corporate clients, for example, have in-house counsel who are fully competent to make the necessary inquiry. Other party litigants may have a great deal of practical litigation experience. . . . Put another way, "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney." . . . Thus, the certification standard, while "more stringent than the original good faith formula," is not inflexible. "The standard is one of reasonableness **under the circumstances**" (emphasis added). Advisory Committee's Note to Fed.Rule Civ. Proc. 11, 28 U.S.C.App., p. 576. This formulation "has been embraced in all thirteen circuits." . . .

This Court should take special notice of the unique position of trust and confidence held by FDIC and plethora of federal statutes according FDIC statutory preferences and presumptions which the federal district courts are required to accord a government-cloaked entity. This case, commenced in 1985 before the state court, documents the real threat to the Separation of Powers doctrine and to the Article III Courts' ability to ensure individual property rights guaranteed under the Constitution, free from "willful, wanton, malicious and arbitrary" taking from government-cloaked agents.

FDIC, through its counsel, raises substantially identical questions of litigation misconduct which the Seventh Circuit was required to address in Barnhill v. U.S., 11 F.3d 1360, 1371 (7th Cir. 1993). (". . . We reverse the case on the merits here because Petitioners' conduct, while hardly exemplary, was not contumacious. . ."). The Seventh Circuit has recently addressed the position of "Equity" in modern jurisprudence. In Const. Indus. Ret. Fund v. Kasper Trucking, Inc., 10 F.3d 465, 468-69 (7th Cir. 1993), the Court noted:

> . . . "Equity is no longer granted or withheld according to the chancellor's sensibilities and his regard for the uprightness of the parties. [It] is designed to achieve compliance with established rules, and even the

> wicked have a right to treatment according to the rules." (citations omitted)

The voluminous case record subject to plenary review shall disclose fraud, deceit and calculated secrecy of critical material facts which FDIC had both ethical and fiduciary duty to disclose before the lower court. FDIC's post appeal conduct in securing Deficiency Judgment (R11-321) and its non-response in its Answer Brief in appeal 92-2819 to the genuine issues clearly articulated and set forth in Appellants' Initial Brief should afford this Court ability to enter de novo finding that FDIC's litigation conduct is "contumacious" which the Seventh Circuit Court could not find in Barnhill supra. This author would respectfully submit FDIC's conduct of artifice and deceit, continued for years before the lower court and then continued before this Court, calls forth a de novo finding that the case record speaks for itself and the misapplication of 12 U.S.C. §1823(e) fully explains why FDIC secured the Deficiency Judgment (R11-321).

Justice Edmondson, in delivering the panel decision in Phipps supra at page 26, stated "some cases speak for themselves" and said statement should apply to this Court's entry of de novo findings that the voluminous twenty volume case record exhausting judicial resources since 1985 must demand deterrence sanctions pursuant to this Court's inherent powers in "Equity." In Salve Regina College v. Russell, 499 U.S. ____, 113 L.Ed. 2d 190, 202, 111 S.Ct. 1217, 1224 (1991), the Court's reasoning, uniquely applicable to this case, was clearly set forth as follows:

> Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration.
>
> . . .
>
> . . . As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive

> analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels, see 28 U.S.C. §§ 46(b) and (c), that permit reflective dialogue and collective judgment. . . .

FDIC is charged with actual knowledge that this case raises issues of constitutional significance, its conduct presents a threat to the Separation of Powers Doctrine and to the Article III Courts' ability to maintain the Administration of Justice. Private litigants' interests in real property are far too significant to rest upon one counsel's analysis and articulation. Salve Regina, ibid., demands this Court's enhanced analytical understandings, and the significant issues raised in this third appeal shall not be limited to appellants' attorney's diminished perception occasioned by FDIC's misconduct.

FDIC's self-serving construction of the integrated mortgage documents, subject matter of their claim against Appellants/Defendants, simply obfuscate and avoid the genuine issues of FDIC's false pleadings and discovery responses specifically noted in Appellants' Initial Brief in appeal 92-2819 and which FDIC failed to address or otherwise respond in their Answer Brief heretofore filed with this Court. The Rules of Contract Construction and Rules of Statutory Construction simply fail to support FDIC's belated arguments and reasoning to justify its failure to truthfully, ethically and honestly disclose the critical information necessary for an informed decision sub justice.

Well established case precedent deny FDIC ability to justify its failure to timely and unequivocally refrain from seeking advantage from erroneous findings of fact occasioned by presumptions accorded its Complaint and Answer. Likewise, evasive discovery responses, never timely and fully disclosed as false, finally documented as false by the 30(b)(6) deposition testimony of Frank H. Thaxton, violated minimum standards of ethical conduct and fiduciary responsibilities necessary to accord Defendants/Appellants

due process. It was contumacious and a blatant fraud for FDIC and its counsel to engage in post appeal motion proceedings seeking Deficiency Judgment (R11-321) on the product of a Summary Judgment (R10-279) secured upon a clarification of prior lower court Order (R8-232) which FDIC had full knowledge was entered prior to and without knowledge of the belated disclosure in Frank H. Thaxton's 30(b)(6) deposition. Well established fiduciary obligations under clearly articulated federal statutes and Florida common law case precedent demand FDIC's accountability for motion conduct which flagrantly violates minimal moral, ethical and fiduciary standards demanded under said statutes and case precedent.

In John Hancock Mut. v. Harris Trust & Sav. Bank, 114 S.Ct. 517, 531, 510 U.S. __, 126 L Ed 2d 524, 545 (1993), the Supreme Court addressed statutory construction and duly noted:

> . . . By reading the words . . . the Department has exceeded the scope of available ambiguity. See Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself").

In the instant case, FDIC's own artifice and deceit manufactured ambiguity by false pleadings and evasive discovery responses which occasioned erroneous findings of fact and law sub justice. FDIC's factual arguments on appeal utilizing lower court's orders are "at odds with the plain language of the statute itself" and further "at odds" with the plain language of the documentation upon which its position must rest.

FDIC's abrogation of minimal "moral, ethical and fiduciary standards demanded under due process of law" occasioned the lower court's erroneous misapplication of statutory authority of 12 U.S.C. §1823(e) and thereby

allowed FDIC to escape sanctions pursuant to the authority of Chambers v. NASCO, Inc., 501 U.S. ___, 115 L.Ed. 2d 27, 53, 111 S.Ct. 2123, 2139-40 (1991). This Court is charged upon plenary review to enter such de novo findings the voluminous case record shall disclose. FDIC's deliberate indifference to repeated admonitions directed to FDIC's Office of the Inspector General elevates FDIC's countenance of post appeal motion conduct to a threat demanding extraordinary deterrence sanctions pursuant to its inherent powers in equity.

Let this Court's opinion and mandate clearly articulate to the People of this Great Nation that Priceless Individual Rights shall be maintained Inviolate, that a Thirty Billion Dollar deterrence, if considered extreme or too great a punishment by some, nonetheless represents a reasonable and necessary sanction to turn back and deter an Administrative Bureaucracy (e.g. FDIC) which knowingly exercised post appeal conduct with full notice of this Court's authority to impose a Thirty Billion Dollar deterrence sanction.

B. **FDIC's "Willful Blindness" to Necessary Supervisory Obligations Demand Deterrence Sanctions.**

FDIC's post appeal motion conduct confirms both the necessity and reasonableness for a private foundation funded with Thirty Billion Dollars assessed against FDIC. A Thirty Billion Dollar sanction represents modest amount against FDIC, in its corporate capacity, for its "willful blindness" to the misconduct of its agents notwithstanding documented notice to its officials, staff attorneys and Inspector General's Office.

The record documents repeated notices to FDIC, clearly articulated in letters delivered to the Inspector General's Office, addressing the very misconduct which compels the extraordinary equitable relief and deterrence sanctions presently before this Court. FDIC's non-action to "repeated notices" id., reasonably imputes corporate acceptance of its agents' conduct far beyond the boundaries of this case; and, FDIC's non-action should reasonably

sustain this Court's de novo finding FDIC likely reaped far more than Thirty Billion Dollars upon the fruits of undetected litigation misconduct in multitude of cases and claims resolved while the instant case remained before the Judiciary.

Failure to enter de novo findings that FDIC's litigation misconduct exceeds the outer parameters of discretion necessarily accorded government agencies shall empower FDIC, and all other agencies similarly cloaked with agency status, with arbitrary power through their agents to abridge the substantive Constitutional Rights of any person. FDIC's willful blindness in the instant case document a willingness of its agents to blatantly circumvent "good faith" compliance with Rules of Court. Without demanding highest accountability of FDIC, in its corporate capacity, this Court might as well distribute guns to these federal bureaucrats and authorize them to go out and seize whatever they claim owing their respective agency.

C. **Administration of Justice Demands Equitable Structuring of Deterrent Sanctions establishing a private foundation as proper depository for deterrence sanctions.**

The scope and magnitude of the threat to the Administration of Justice can be measured by more than one million cases each year in which government cloaked agents appear before the state and federal courts. It is beyond dispute that without accountability or fear of sanctions for misuse of unique statutory preferences and presumptions necessarily accorded government, by virtue of the magnitude of cases government cloaked agents bring before the Judiciary, then these very "presumptions and preferences" accorded in the Public Interest shall destroy the very "Rights" the Article III Courts are charged to ensure "Inviolate."

This Court cannot escape the time tested truism that "Power Corrupts, and Absolute Power, Corrupts Absolutely." This case, in what commenced as an insignificant case, only one of more than one hundred thousand cases involving failed lending institutions pending before the courts, shall require this Court to pierce FDIC's veil of obfuscation and

recognize the resolution of the instant "case and controversy" implicates a threat to the fundamental integrity of the Judiciary.

Counsel for Defendants/Counter Plaintiffs, has long recognized and accepted the risks demanded by FDIC to position the instant "case and controversy" before this Court for final justiciability. This Court shall resolve years of necessary deference accorded in the Public Interest, accorded ever increasing number of entrenched non-elected federal bureaucrats, shall compel de novo finding that a multi-billion dollar deterrence sanction against FDIC is necessary, reasonable, and demanded by the case record on appeal. Likewise, this Court shall resolve if anything less than the Thirty Billion Dollar sanction amount, duly noticed FDIC in letter to the Office of its Inspector General and in First Reply Brief, page 25, filed before this Court in Case No. 92-2819, could command or justify any lesser amount. FDIC, by its post-appeal conduct, knowingly and willingly accepted risk of Thirty Billion Dollars with disdain of any Court affixing such a high price upon its Integrity. This case documents that Congress cannot micro-manage FDIC or the banking industry. Furthermore, the case record on appeal documents a fatal flaw of the Article III courts' ability to ensure the Administration of Justice when willing government agents and the entities (i.e. FDIC) whose work they are carrying out, exercise "willful blindness" to their responsibilities.

The magnitude of the threat to the Judiciary is most evident in total absence of amicus briefs or legal scholars seeking Leave of Court to address significant issues raised in this case implicating Administrative agencies and instrumentalities which are the creation of statute operating under the Executive Branch of Government. The Touchstone Separation of Powers Doctrine has been heralded as that which distinguishes the United States Government above all others, past or present. Plenary review of the case record shall demand entry of de novo finding that FDIC and its agents committed pervasive fraud, knowing abridgement of

Fundamental Due Process and knowing abridgement of substantive Constitutional Rights.

Counsel for Appellants submit that only through the creation of a private foundation, funded by the Thirty Billion Dollar deterrence sanction FDIC willingly and knowingly risked, shall Individual Rights of the People have any reasonable expectation of survival when government cloaked agents appear in cases and controversies before the Judiciary. This Court has inherent authority in equity to structure an Opinion and Mandate that shall reasonably ensure against arbitrary abridgement of individual rights by FDIC's deliberate indifference to its agents' willingness to place the Price of Justice out of reach.

FDIC was placed upon full notice of a private foundation being proper depository for deterrence sanctions and potential that Thirty Billion Dollars could be assessed as reasonable and necessary to abate and deter litigation misconduct implicating a threat to the Administration of Justice. A private foundation, established for the People, a creation arising out of documented misconduct and necessity to ensure no government agency ever again perceives the ability to place price of justice out of reach, shall serve sound Judicial and Public Interests.

A private foundation, as opposed to public foundation, shall stand as a barrier to the corruption of the political process and loss of intellectual integrity in seeking political correctness of the cost of reason and common sense. This Court has authority for establishment of a private foundation, and demand in the binding corporate documentation necessary for its creation, expressed purpose clause that said Foundation shall forever protect and promote, through education and pro-active litigation, the interests of intellectual integrity, government accountability and such other areas deemed reasonable or necessary to protect the Constitution of the United States.

It is the instant case record before this Court which documents and compels <u>de novo</u> finding that only a private foundation, structured pursuant to this Court's inherent

authority in equity, shall any deterrence sanction have prospective affect upon the growing federal bureaucracy. This Court cannot, at this late date, declare as unconstitutional the federal bureaucracy long accepted by the Judiciary pursuant to General Welfare clause for Congress to establish and to be administered under the Executive branch of government.

If money alone could ensure the sanctity of the Constitution, this Court would find no difficulty, whatsoever, for Congress would unquestionably allocate such money and speed legislation through Congress in record time. The problem is not the lack of money; but the delegation of enhanced powers and unlimited access to money by non-elected federal bureaucrats whom no longer fear detection for litigation misconduct. A private foundation is necessary to bring federal agencies, instrumentalities and bureaucrats, including agents, to a renewed sense of their respective accountability and responsibility.

The corruption of politics, state and federal, evidences a decline in the moral and intellectual integrity demanded of our elected representatives by the electorate. FDIC has foisted upon an over burdened Judiciary intellectually and morally corrupt arguments disingenuous to applicable statutory authority and case precedent. Proper application of established rules of statutory construction and good faith compliance with Rules of Court shall demand de novo finding that FDIC knowingly engaged in a malicious trial strategy, undetected sub justice, which sought to place the price of justice beyond reach of private litigants seeking protection of the courts from unethical, arbitrary and constitutionally repugnant litigation strategy.

FDIC stands before this Court emblematic of a federal bureaucracy too long accorded necessary deference and ever-increasing powers in the public interest without Article III courts ensuring effective and necessary safeguards against the abuse of these enhanced powers. This case, specifically involving misconduct by the FDIC, is but one example of an

entire federal bureaucracy out of control and standing above the Rule of Law.

The ethics of the Prosecutors in Israel and the Administration of Justice under the judicial system of Israel, fully evidenced in Demjanjuk, implicates ominous concerns for the judicial system of the United States' ensuring the Administration of Justice. It is a sad commentary for the Justice Department of the United States to exhibit ethical conduct far below the standards exemplified by the Israeli counterpart, supra, and further implicates grievous admonitions that our burgeoning federal bureaucracies, which both the Department of Justice and FDIC constitute a part thereof, the former having already demanded the overturning of previous lower court decisions which survived appeal and the latter, involving FDIC's conduct in the instant case before this Court, now documenting an insidious corruption of the Federal Judiciary and its ability to ensure the Administration of Justice by at least two federal agencies.

This Court cannot abrogate its responsibility to maintain control over an expanding federal bureaucracy. Judicial acceptance of the Congressional statutes which created the federal bureaucracy imposes responsibility to either maintain control over said bureaucracy or to declare the vast federal bureaucracy unconstitutional. It is respectfully submitted that structuring the establishment of a private foundation, funded with Thirty Billion Dollars in deterrence sanctions assessed against FDIC, is eminently reasonable and within the inherent authority of this Court to maintain integrity in the Administration of Justice.

VI.
CONCLUSION

The Honorable Judges of the Eleventh Circuit are respectfully requested to resolve de novo all genuine issues disclosed upon plenary review or otherwise identifiable by the enhanced understanding and analysis recognized by the Supreme Court in Salve Regina, Supra. Let this Court issue

an Opinion and Mandate consistent with this Court's analysis and de novo findings deemed necessary and reasonable to address the significant issues disclosed by its plenary review of the voluminous case record, including all necessary and proper de novo findings of FDIC's fraudulent intent and accountability demanded under this Court's responsibility as "Guardians of the United States Constitution."

Defendants/Appellants would respectfully request this Court to enter de novo findings, along with others this Court no doubt shall perceive, the following:

1. That this Court find as a matter of law the lower court relied upon erroneous application of 12 U.S.C. §1823(e) occasioned by FDIC's litigation misconduct.

2. That this Court find the lower court's orders upon which the Deficiency Judgment (R11-321) must necessarily stand was secured in violation of "due process of law" occasioned by FDIC's litigation misconduct.

3. That this Court find the FDIC's post appeal motion conduct both sub justice and continued in motion proceedings before this Court demands de novo findings that said post appeal motion conduct was "willful, wanton and malicious."

4. That this Court find that FDIC knowingly countenanced and evidenced flagrant disregard to supervisory responsibilities demanded by its fiduciary duties and well established obligations necessarily required of government-cloaked agents to ensure "due process of law."

5. That this Court find FDIC's post appeal motion conduct demands de novo findings that said conduct was continued with full knowledge and fraudulent motive to secure favorable rulings, which, if granted, would successfully consummate taking of Defendants/Appellants' real property rights in violation of the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.

6. That this Court find FDIC's evasive discovery responses, improper motion practice and deceptive pleadings were fully disclosed in repeated unambiguous notices to

management, staff attorneys and FDIC's Office of the Inspector General demanding deterrence sanctions under Rule 11 and pursuant to this Court's inherent authority in equity to maintain the integrity of the Administration of Justice.

7. That this Court find Thirty Billion Dollars is reasonable and necessary to maintain the Administration of Justice and that a Foundation is proper depository for such sanctions.

8. That this Court enter such de novo findings deemed necessary and reasonable to ensure sanctity of the Separation of Powers Doctrine as disclosed by plenary review and deny FDIC ability to avoid appellate resolution by procedural device upon technical arguments which were denied informed resolution sub justice upon product of FDIC's own wrongful litigation misconduct.

9. That this Court find Appellants' counsel is entitled to reasonable attorneys fees under applicable statutes and equitable principles for placing FDIC in a position of accountability before this Court.

10. That this Court render such other and further relief that it deems necessary and proper.

Respectfully submitted,

/s/Daniel K. Schaffner
Daniel K. Schaffner, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief of Appellants and Record Excerpts have been served, by U.S. Mail, postage pre-paid, this 16th day of May, 1994 to the following addressees:

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAKE TARPON RESORT, INC., et al.,

Defendants/Appellants

N. 93-3492

v.

FEDERAL DEPOSIT INSURANCE, CORPORATION, as Receiver for Audubon Federal Savings & Loan Association,

Plaintiff/Appellee

_____/

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Plaintiff/Appellee, in compliance with FRAP 26.1 and 11th Cir. R.26.1-1, certify that the following listed persons and parties have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualifications or recusal pursuant to the local rules of court:

1. Al-Kelani, Inc.
2. Gehad Al-Kelani
3. Hachim Al-Kelani
4. Alan J. Braithwaite
5. The Honorable Anne C. Conway, U.S.D.J.
6. Enterprise Building Corp.
7. Federal Deposit Insurance Corporation
8. Antoinette Iredale
9. Douglas Iredale

LAKE TARPON RESORT, INC., et al.,
v. FDIC

10. The Honorable Elizabeth A. Jenkins
11. Lake Tarpon Resort, Inc.
12. Daniel K. Schaffner, Esquire
13. Neal A. Sivyer, Esquire
14. Robert M. Winick, Esquire

Plaintiff/Appellee further represents that Federal Deposit Insurance Corporation is a division of the Federal Government. FDIC has no affiliates or subsidiaries which have issued stock to the public, nor is it held by a parent corporation.

Respectfully,

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Deposit Insurance Corporation does not believe that oral argument is necessary in this case because the district court correctly applied this Court's jurisprudence, federal, and state law to enter the Deficiency Judgment. If this Court deems it necessary to have oral argument, the FDIC will welcome the opportunity to appear and answer any questions the Court may have.

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STATEMENT OF JURISDICTION

The Federal Savings and Loan Insurance Corporation (FSLIC) as Receiver for Audubon Federal Savings and Loan removed this case to the United States District Court for the Middle District of Florida from Florida State Court, pursuant to 12 U.S.C. section 1730 and 28 U.S.C. section 1446. The Federal Deposit Insurance Corporation (FDIC) was subsequently substituted for FSLIC as the Plaintiff (R5-121-1).

On August 17, 1992, the district court entered Final Judgment of Foreclosure in favor of the FDIC in the amount of $14,047,579.73. The August 17 Judgement reserved the district court's jurisdiction to establish a deficiency amount. On August 18, 1992, Appellants filed a Notice of Appeal from that final judgment, but failed to obtain a stay of the judgement or to post a bond.

After confirming the foreclosure sale, on September 28, 1993, the district court entered judgment against the borrowers for the amount of the deficiency remaining after application of the proceeds of the sale (R11-310). The District Court entered an amended final deficiency judgment on November 4, 1993 (R11-321). The borrowers filed a timely Notice of Appeal from the final judgment on December 2, 1993 (R11-322). This Court has jurisdiction over this appeal under 29 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the district court had jurisdiction to establish a deficiency amount and enter a deficiency judgment where borrowers had failed to obtain a stay of the foreclosure order pending appeal?

2. Whether the district court's deficiency judgment constituted an abuse of discretion where the evidence of the value of the collateral was uncontroverted and where no equitable considerations justified a reduction in the deficiency amount?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

This action began as a foreclosure suit brought on December 11, 1985, by the Audubon Federal Savings and Loan (Audubon) in Florida State Court. Audubon also sued on the Promissory Note secured by the Mortgage and on certain Guarantees (R1-3). In its Complaint, Audubon alleged that the borrowers were "in default" of the terms of the loan instruments in several respects, including their failure to make any payments under the Mortgage, and allowing mechanics liens to be placed on the property without bonding them off (R1-3).

In June 1986, about 7 months after the foreclosure suit was filed, the Federal Home Loan Bank Board declared Audubon to be insolvent, and appointed the FSLIC as its receiver (R1-1,3). The FSLIC removed the action to the district court, pursuant to 12 U.S.C. section 1730 and 28 U.S.C. section 1446 (R-1-2). The FDIC subsequently was substituted for FSLIC as the Plaintiff (R5-121-1).

On November 24, 1986, defendants Al-Kelani, Inc., Gehad and Hachim Al-Kelani, George and Antoinette Iredale, and Alan Braithwaite ("the borrowers") filed their Answer,

Affirmative Defenses and Counterclaim (R1-14-4,5).[1] They argued that the FDIC should be estopped from foreclosing due to the replacement of the general contractor on May 1, 1984, allegedly without their consent (R1-4).

The district court granted the FDIC's Motion to Strike the Affirmative Defenses of Al-Kelani, Inc., the Al-Kelanis, Braithwaite, and the Iredales on December 19, 1991, (R8-232). At page two of its order, the district court stated as follows: "the Defendant has not produced or pointed to any evidence in the record showing that its obligations under the Note, Guarantee, and Mortgage in this case were contingent or dependent on the Building Contract with [the general contractor.]" (R8-232).

On July 6, 1992, the district court entered an Order granting Summary Judgment of Foreclosure to FDIC on its Complaint and against the borrowers on their Counterclaims (R10-279). On August 17, 1992, the district court entered a Final Judgment of Foreclosure (R10-286). The August 17 Order rendered judgment on the Notes and Guaranties for $14,047,579.73, and reserved the district court's jurisdiction to establish a deficiency amount after foreclosure of the collateral. The borrowers filed a Notice of Appeal of the foreclosure judgment on August 18, 1992.[2]

On November 3, 1992, the borrowers filed an emergency motion for stay of execution without requiring bond in the district court (R11-293). On November 4, 1992, the district court denied that motion (R11-294). Accordingly, a judicially-supervised foreclosure sale took place on November 6, 1992 (R2-297). The FDIC Receiver purchased both parcels of mortgaged property at that sale. On

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[1]Iredale and Al-Kelani, Inc. are guarantors and makers under the Promissory Note. Hachim and Gehad Al-Kelani and Braithwaite are guarantors. This Brief will sometimes refer to all of the appellants as the "borrowers."

[2]That appeal is pending before this Court in Case No. 92-2819, and has been consolidated with this appeal.

November 23, 1992, the district court entered an Order Confirming the Foreclosure Sale (R11-299). When Appellants failed to post a bond, FDIC filed its Motion for Deficiency Judgment on March 24, 1993 (R11-300).

After an evidentiary hearing, September 3, 1993, the Magistrate Judge entered a Report and Recommendation, which recommended entry of a deficiency judgment in favor of FDIC (R11-308). Appellants failed to present any evidence in opposition to the deficiency judgment request. The only objection voiced at the hearing was that the District Court lacked jurisdiction to enter a deficiency judgment (R11-318-14-19).

On September 30, 1993, the District Court entered judgment against the Appellants/Borrowers for the amount of the deficiency remaining after application of the proceeds of the sale. The District Court later entered an Amended Judgment on November 4, 1993, to specifically include the parties' names and addresses (R321). This appeal followed. This Court consolidated this appeal with the appeal in No. 92-2819, in January, 1994.

B. Statement of the Facts

On March 12, 1984, Audubon loaned $8 million dollars to the borrowers to fund the construction of a large hotel development in Pinellas County, Florida called Hotel Mediterranean (R1-3). To evidence the loan, the borrowers executed a note, mortgage, construction loan agreement, and other loan documents. As security for the loan, on March 12, 1984, Bill Green, Gerald P. Moore, Kenney Schryver, Douglas Iredale, and Al-Kelani, Inc. ("borrowers"), mortgaged a vacant parcel of property ("hotel property") in Pinellas County to Audubon. Other residential lots owned by Appellant/Guarantor Al-Kelani, Inc., were mortgaged to Audubon as additional collateral (R1-3-3). The remaining lots, ("Additional Collateral") (R1-3-3). The $8 million loan was made for the purpose of constructing a hotel and conference center (R13, *Complaint*). By the fall of 1985,

construction of the hotel project had terminated. The borrowers had made no payments on the Note and Mortgage (R9-246, par. 10; R8-213-112, line 10). The general contractor, Hawkins Construction, filed a Claim of Lien on the Hotel Property (R1-13).[3]

After foreclosure on the collateral securing the debt, the FDIC sought a deficiency judgment based on the difference between the $14 million judgment amount and the value of the property received through the foreclosure sale, as well as funds that were received from an escrow fund from the sale of some of the Additional Collateral. At the hearing on the deficiency judgment, FDIC presented evidence which included an MAI (Member Appraisal Institute) Appraisal, in order to establish the value of the collateral. The Borrowers submitted no controverting evidence.

The Magistrate Judge found that the market value of the appraisals was reasonable, and after offsetting credits to which the Appellants were entitled, recommended the entry of a deficiency judgment of $12,847,409.00 (R11-308-7). The District Court adopted this recommendation and entered the deficiency judgment on appeal here.

Standard of Review

This Court reviews a deficiency judgment under an abuse of discretion standard. *Federal Deposit Insurance Corporation v. Morley*, 915 F.2d 1517 (11th Cir. 1990).

Summary of the Argument

Well settled law compels affirmance of the District Court's deficiency judgment. The district court had jurisdiction to enter a deficiency judgment enforcing the final judgment of foreclosure. That foreclosure judgment specifically reserved the right of the district court to establish

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[3]Additional facts concerning the original foreclosure action are set forth in detail at pages 5-6 of Appellee's Answer Brief in Case No. 92-2819, which has now been consolidated with this case.

a deficiency amount. The Borrowers neither obtained a stay of the foreclosure order nor did they post a bond.

Further, the district court properly applied the standards established by this Court in determining the amount of the deficiency. This Court has held that the amount of a deficiency judgment is calculated by determining the amount unpaid on the mortgage, less the fair market value of the property securing it, absent some unusual legal or equitable principle justifying reduction of the deficiency amount. *Federal Deposit Ins. Corp. v. Morley*, 915 F.2d 1517, 1520-1521 (11th Cir. 1990). Appellants raised no objections to FDIC's evidence of value, and raised no "equitable considerations" that would justify the denial of a deficiency judgment. The District Court did not abuse its discretion in entering the deficiency judgment. This Court should affirm the November 4, 1993 Judgment.

ARGUMENT

I. The District Court Had Jurisdiction to Issue the Deficiency Judgment

The Borrowers argue that a deficiency motion was premature (Appellants' Brief at p. 10). They contend that the district court lacked the authority to issue a deficiency judgment until resolution of the Appeal from the final judgment of foreclosure (Appellants Brief at p. 6,10). As the district court correctly held, there is no merit to the borrowers' unsupported contention.

Under the terms of the August 17 Judgment, the district court specifically reserved jurisdiction to enforce the Judgment by making "other orders that are proper, including an order confirming sale, an order establishing a deficiency judgment, enforcement of the disbursement of the escrow funds, and writs of possession (R10-286)." Rule 62(d) of the Federal Rules of Civil Procedure provides for the stay of execution of a judgment where an appeal is taken on the condition that the appellant post a supersedeas bond. Here,

the borrower never posted a bond and the district court denied their motion for a stay under Rule 62. This Court also denied their Motion for Stay under Rule 8 of the Federal Rules of Appellate Procedure.[4] Accordingly, the district court properly acted to enforce the August 17 Judgment by establishing the deficiency amount. This court should reject the borrowers' jurisdictional challenge to the deficiency amount.

II. The FDIC Satisfied its Burden to Establish Entitlement to and the Amount of the Deficiency Judgment

It is well established that under Florida law, a judgment creditor is entitled to a deficiency judgment if the value of the security on the date of sale is less than the amount of the final judgment. *Norwest Bank v. Milard*, 522 So 2d 546 (Fla. 4th DCA 1988).[5] The amount of a deficiency judgment is calculated by determining the amount unpaid on the mortgage, less the fair market value of the property securing it, absent some unusual legal or equitable principle to justify reducing the deficiency amount. Id at 547. A mortgage

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[4]In connection with their request for a Stay, the Borrowers raised the same allegations of unfairness and bad faith actions by the FDIC upon which they base their "ripeness" argument. In denying the Stay this Court reflected those allegations.

[5]Florida Statute 702.06 provides as follows:

> "In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound of judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor."

holder is entitled to a deficiency judgment, in the absence of unusual equitable circumstances. *Federal Deposit Insurance Corporation v. Hy Kom Development Co.*, 603 So2d 59, 60 (Fla 3d DCA 1992), review denied, 618 So2d 209 (Fla. 1993).

As the district court explained, this Court has applied Florida law to hold that in exercising their discretion to establish a deficiency amount, courts determine: (1) the difference between the amount of outstanding debt and the fair market value of the property; and (2) whether any equitable considerations warrant reduction of the actual deficiency. *Federal Deposit Ins. Corp. v. Morley*, 915 F.2d 1517, 1520-1521 (11th Cir. 1990). (R11-308-5,6).

In *Morley*, this Court affirmed a motion for a deficiency judgment against the defendants, based upon a $37,000,000.00 construction loan which resulted in a $14,585,000 successful bid at the foreclosure sale. In support of the motion, FDIC filed an appraisal setting the fair market value at $17,000,000.000, as well as the certificate of title, and information from the receiver. In *Morley*, this Court refused to find that the trail court had abused its discretion by entering a deficiency judgment of $16,577,401.00, without conducting an evidentiary hearing. Here the District Court below did conduct an evidentiary hearing before establishing the amount of the deficiency judgment. The Borrowers have raised no valid legal or factual challenge to that amount. This Court should affirm the deficiency judgment.

A. The Evidence Supports the Amount Determined by the District Court.

At the evidentiary hearing to establish the amount of the deficiency judgment, the FDIC presented sworn testimony from an MAI (Member Appraisal Institute) Appraiser, Brenda Dohring, and submitted her appraisal in order to establish the value of the property as of the date of the sale. The FDIC also introduced evidence of the purchase price at the

foreclosure sale, as well as the assessed value for real estate tax purposes (R11-308-6). The evidence showed that Appellants delayed this foreclosure for six years, allowing the property to become run down, abandoning the construction of the hotel which served as the FDIC's primary collateral.

None of FDIC's evidence was disputed through oral testimony or documentation by Appellants. Indeed, Counsel for Appellants presented no defenses at the hearing on the Motion for Deficiency Judgment. Appellants presented no witnesses and did no cross examination. The record shows that the Magistrate's attempts to elicit the Borrower's objections were unsuccessful.

> "The Court (Magistrate Jenkins) - My question to you [Mr. Schaffner] is do you have any disagreements as to the appraisals that have been submitted of these two pieces of property?
> Mr. Schaffner - I would merely raise objections to their relevancy Your Honor.
> The Court - Well if the only objections are to relevancy - -
> Mr. Schaffner - And I would dispute their validity as to who, in fact, has occasioned the eight year diminution in value. The appraisals are based on a spread between the original value and what they've ended up selling for. We are contesting an appeal the very fundamental nature of who occasioned --
> The Court - Do you wish an opportunity to cross examine the appraiser they brought to the hearing or are we going to stipulate to the reports?
> Mr. Schaffner - I do not perceive cross-examination would address the issue that I pose to the evidentiary testimony or that reflected by the appraisals, Judge."
> Transcript of Hearing dated September 2, 1993 (R11-318 at page 14-15).

> "The Court - Do you have any cross examination?
> Mr. Schaffner - No Ma'am."

(R11-318 at page 19)

As in *Morley*, it was well within the sound discretion of the district court to establish the deficiency amount based on FDIC's uncontroverted evidence. The deficiency judgment should be affirmed.

B. No Equitable Considerations Justify Reduction of the Amount of the Deficiency Judgment

The District Court properly determined that no "equitable considerations" justified reducing the amount of the deficiency judgment. The District court rejected the arguments now raised on appeal that FDIC's alleged bad faith activities deprived them of their real property (Appellants Brief at p. 35-42).[6] Moreover, the allegations of bad faith by Appellants form no basis for reducing the amount of a deficiency judgment.

In seeking enforcement of the final foreclosure judgment, the FDIC merely exercised its responsibility to collect on a debt owed by Appellants, who, the record shows, had failed to make any payments under the subject note and mortgage, and had abandoned the project when it was partially constructed (R9-253).

Moreover, as the district court held, Appellants' unsupported allegations that FDIC engaged in bad faith conduct do not even come close to meeting the criteria set

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[6] Appellants raised these arguments as part of their objections to the Report and Recommendation by Magistrate Jenkins (R11-309-2). They were not raised as affirmative defenses and counterclaims before the Magistrate. Indeed, Appellants never claimed, as they do now in the appeal, that the Federal Statute at 12 U.S.C.§1823(e) is unconstitutional. This Court's predecessor has ruled that the failure to allege Constitutional defenses below precludes the appellants from raising them for the first time on appeal. In *Rubin v. United States*, 289 F.2d 195 (5th Cir. 1961) See also *Louisiana High School Athletic Association v. St. Augustine*, 396 F.2d 224 (5th Cir. 1968) Accord, *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976).

forth for Rule 11 Sanctions.[7] See Appellees Answer Brief in Consolidated Case No. 92-2819 at 24-25.

The Appellants also make a general assertion that Rule 60(b) Fed R. Civ. P. should somehow result in the entry of Rule 11 sanctions against FDIC, and the reversal of the deficiency judgment. (Appellants brief at pages 31-35). Rule 60(b) allows the Court to set aside judgments that were fraudulently entered or entered by mistake. However, Appellants never filed a motion under Rule 60(b) for relief from judgment in the district court, nor would their vague factual allegations justify such relief.

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[7]The Magistrate Judge entered an Order on March 24, 1992, denying the Appellants' Motion for Sanctions inter alia, stating:

> "generalized allegations of improper motives of a party or counsel which are not supported by a specific factual basis are inappropriate argument. Any such future allegations by Defendants shall be supported by specific facts. Failure to do so may warrant the imposition of appropriate sanctions for failing to conduct a reasonable inquiry prior to filing a motion, pleading, or other paper, or filing a paper for an improper purpose . . . Defendants' Request for Hearing, Rule 11 Sanctions, And Imposition of Necessary Sanctions in Equity (Dkt. 240) are Denied." (R9-256-9,10).

CONCLUSION

For the foregoing reasons this Court should affirm the District Court's Amended Judgment in a Civil Case establishing the deficiency amount owed to the FDIC after application of the proceeds of the foreclosure sale.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Appellee, FDIC have been mailed by first class mail, this _____ day of June, 1994, to the following addressees:

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-3492

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as Receiver for Audubon Federal
Savings & Loan Association, Plaintiff

versus

LAKE TARPON RESORT, INC., AL-KELANI, INC.
ALAN BRAITHWAITE, DOUGLAS AND
ANTOINETTE IREDALE,
GEHAD AND HACHIM AL-KELANI
Defendants

On Appeal from the United States District Court for the
Middle District of Florida

REPLY BRIEF OF APPELLANTS AL-KELANI, INC. ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE IREDALE, GEHAD AND Hachim AL-KELANI IN APPEAL NO 93-3492

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-3492

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as Receiver for Audubon Federal Savings & Loan Association, Plaintiff

versus

LAKE TARPON RESORT, INC., et. al.
Defendants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 FRAP, I hereby certify that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal No. 93-3492:

Al-Kelani, Inc.
Gehad Al-Kelani
Hachim Al-Kelani
Audubon Federal Savings and Loan Association
Alan J. Braithwaite
The Honorable William J. Castagna
C.E.S. Industries, Inc. d/b/a Consolidated Electric
The Honorable Anne C. Conway
Federal Deposit Insurance Corporation, as Receiver for Audubon Federal Savings and Loan Association

LAKE TARPON RESORT, INC. et al.
v FDIC, Appeal No. 93-3492

Federal Deposit Insurance Corporation,
in its corporate capacity
Federal Savings and Loan Insurance Corporation
Hawkins Construction Company, Inc.
Antoinette Iredale
Douglas Iredale
The Honorable Elizabeth A. Jenkins
Lake Tarpon Resort, Inc.
Roger Meagher, Esquire
RCA Service Co.
Daniel K. Schaffner, Esquire
The Honorable Harvey E. Schlesinger
Neal A. Sivyer, Esquire
U.T. Communications Credit Corporation
Robert M. Winick, Esquire
Robert C. Boatwright
Charles P. Hunt
Leslie J. Hunt
Samuel R. Mandelbaum, Esquire
Office of the Inspector General of the FDIC
Larry Froehlich, Esquire
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Respectfully submitted,

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Appellants Al-Kelani, Inc.,
Alan Braithwaite, Douglas
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Gehad and Hashim Al-Kelani

STATEMENT REGARDING ORAL ARGUMENT

Appellants Al-Kelani, Inc., Alan Braithwaite, Douglas and Antoinette Iredale, Gehad and Hashim Al-Kelani, understand that oral argument has been heretofore granted under administrative decision in Appeal 92-2819. Notwithstanding, in abundance of caution, the Appellants would respectfully submit that oral argument is necessary as this case involves issues of contract construction, statutory interpretation, fiduciary violations by federal receiver and constitutional law questions which were not addressed in the lower court, obfuscated by the passage of time and voluminous case record that must be reviewed by this Honorable Court. Oral argument will supplement the briefs and facilitate the Court's full understanding of the disposition of the case below and the issues on appeal. Accordingly, it is the position of appellants that oral argument is necessary in the instant case.

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STATEMENT OF THE ISSUES

ISSUE I. Whether FDIC filing an Answer Brief maintaining adversarial posture on appeal upon grounds asserted at Issues 1 and 2 removes slightest doubt and places beyond dispute the necessity for issuance of an Opinion and Mandate against FDIC, in its corporate capacity pursuant to this Court's inherent authority in equity providing swift, complete and final relief.

PREFACE TO ARGUMENT

FDIC's arguments in this third appeal maintains "willful blindness" to wrongful and prejudicial preclusion of facts and law occasioned by misapplication of statutory mandates[1] and established case precedent which FDIC at all material times was charged with full knowledge. Likewise, FDIC at all material times was charged with full knowledge and understanding of prejudice from arbitrary and "bad faith" utilization of unique statutory authority and Rules of Court applicable to the pleadings and motion proceedings the lower court judges were required to apply sub justice. FDIC's adversarial posture before this Court is disingenuous to the facts and law three successive federal district judges and their Magistrate accepted as true when entering the lower court orders and judgments subject to plenary review and de novo consideration by this Court.

FDIC's "willful blindness" to genuine issues of prejudice, erroneous findings of facts and misapplication of established statutory authority occasioned by deceptive pleadings[2], and evasive discovery responses[3], shall demand

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[1] See Appellants' Initial Brief in Appeal 93-3492, pgs. 13-16.

[2] See Appellants' Initial Brief in Appeal 92-2819, "Statement of Facts" pgs 9-17.

[3] Id.

de novo findings of knowing obstruction and imputing wanton and malicious fraud on the part of FDIC. Likewise, FDIC's "willful blindness" shall demand de novo finding of knowing breach of fiduciary obligation to refrain from seeking any advantage upon product of presumption and preferences duly reposed with FDIC in the public interest. The enhanced presumptions and preferences accorded FDIC shall demand de novo findings ensuring FDIC's accountability and entry of de novo findings ensuring factual predicate for necessary deterrence sanctions. This Court is charged to deny and forever deter utilization of "willful blindness" by FDIC or any other similar situate government-cloaked entity. This Court is charged to ensure FDIC's absolute compliance with good faith obligations and forever deter "willful blindness" to express statutory mandated fiduciary responsibilities necessary to insure "due process."

ARGUMENT

ISSUE I

FDIC'S MAINTAINING ADVERSARIAL POSTURE ON APPEAL PLACES BEYOND DISPUTE NECESSITY OF ISSUANCE OF AN OPINION AND MANDATE AGAINST FDIC PURSUANT TO THIS COURT'S INHERENT AUTHORITY IN EQUITY PROVIDING SWIFT, COMPLETE AND FINAL RELIEF

The cases and authority relied upon by FDIC simply cannot stand critical analysis. Likewise, FDIC's adversarial posture maintained before this Court is deemed to provide unequivocal evidentiary documentation demanding de novo finding of FDIC's knowing utilization of "willful blindness" to consummate through appeal its undetected fraud and abridgement of Defendants/Appellants' Constitutional Rights, sub justice. FDIC's Answer Brief further reflects impunity of the body corporate, its agents, officers, employees and attorneys, whom have lost all fear of accountability or belief

that meaningful sanctions would ever be imposed against FDIC by this Court. See FDIC v. Harrison, 735 F.2d. 408, 412 (11th Cir. 1984), stating ". . . when the FDIC acts in its corporate capacity as receiver, its liability must be determined in the same fashion as that of a private party." This case documents that FDIC was substituted as "party plaintiff" by lower court order (R5-121-1).

FDIC cannot maintain an honest belief in designation as controlling precedent[4] this Court's case authority of Federal Deposit Insurance Corporation v. Morley, 915 F.2d 1517 (11th Cir. 1990). FDIC's self-serving and over-simplistic characterization of issues in its Answer Brief is outright disingenuous to the complex motions and memoranda submitted before the lower court. FDIC is charged with full knowledge of the plethora of motions and memoranda filed prior to the final belated acknowledgement in sworn testimony by Frank H. Thaxton at 30(b)(6) deposition of critical documentation inapposite to the allegation of its Complaint. It is egregious for FDIC to maintain "willful blindness" of prejudice occasioned by material facts having been withheld from "good faith" disclosure which were necessary for informed resolution of complex motion proceedings sub justice.

FDIC's utilization of Morley is outright specious for the purposes clearly reflected at page 7 of FDIC's Answer Brief wherein it is asserted:

> Further, the district court properly applied the standards established by this Court in determining the amount of the deficiency. This Court has held that the amount of a deficiency judgment is calculated by determining the amount unpaid on the mortgage, less the fair market value of the property securing it, absent some unusual legal or equitable principle

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[4]FDIC designated pursuant to 11th Circuit Rules by notation of an asterisk in the Citation of Authorities section of its Answer Brief.

> justifying reduction of the deficiency amount. Federal Deposit Ins. Corp. v. Morley, 915 F.2d 1517, 1520-1521 (11th Cir. 1990).

FDIC's argument, ibid., evidences "willful blindness" to the facts and law applicable to the issues raised in appeal 92-2819, which identify genuine issues of FDIC's artifice and deceit. It is contumacious and unworthy of honest belief for FDIC to maintain Morley as justifying their adversarial position before this Court. Morley, at 1519, clearly documented said case was without value as precedent, specifically noting at Footnote 1 "We affirmed the grant of summary judgment in FDIC v. Morley, 867 F.2d 1381 (11th Cir. 1989), cert. denied, -----, 110 S.Ct. 75, 107 L.Ed.2d 41 (1989)."

This Court must not countenance "willful blindness" on appeal and is charged to impute fraudulent intent to FDIC's argument which foists upon this over-burdened appellate tribunal authority disingenuous to the proper application of legal precedent demanded under the genuine issues subject to appellate resolution. FDIC's fraud and improper purpose is most evident in their attempt to paper over clear Supreme Court case authority noted at page 43 of Appellants' Initial Brief, stating:

> In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed. 2d 359 (1990), the Court noted:
>
> > . . . an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. . . .

Appellee's "willful blindness" of genuine issues raised before this Court imputes insidious attempt to manufacture exculpatory issue of honest mistake in interpretation of applicable case precedent for utilization on appeal once this Court imposes deterrence sanctions pursuant to its inherent authority in equity. It is submitted that FDIC's failure to acknowledge or otherwise respond to the genuine issues of fact and law provides this Court with sufficient basis to impute fraud and justify entry of de novo findings that FDIC knowingly sought to consummate through appeal its undetected fraud.

FDIC's arguments in their Answer Brief at page 7 evidence nothing more than smoke and mirrors if intended to justify its adversarial position in stating:

> Appellants raised no objections to FDIC's evidence of value, and raised no "equitable considerations" that would justify the denial of a deficiency judgment. The District Court did not abuse its discretion in entering the deficiency judgment. This Court should affirm the November 4, 1993 Judgment.

Ibid. Only intentional willful blindness can be imputed to FDIC, its staff attorneys and its attorney of record in failing to acknowledge this Court's binding case precedent, adverse to FDIC's appellate posture, demanding applicability to the clear and unambiguous facts and law presently before this Court. FDIC's argument, ibid, exercises "willful blindness" to the lower court precluding equitable issues which FDIC insidiously argues that "Appellants . . . raised no 'equitable considerations' that would justify the denial of a deficiency judgment." Ibid. Neither FDIC in its corporate capacity, nor its agents, officials, employees or attorneys can justify failing to disclose the prejudice occasioned by false pleadings and discovery responses the lower court was required to accept as true in entering the orders and judgments presently on appeal before this Court.

It is respectfully submitted that FDIC's "willful blindness" and self-serving manufacture of exculpatory argument for utilization to appeal any sanctions this Court imposes upon plenary review of the voluminous case record on appeal and proper entry of de novo findings, procedurally avoided sub justice, imputes fraudulent intent and improper purpose likewise subject to de novo findings by this Court. It is axiomatic that no attorney or government-cloaked attorney can deny knowledge through "willful blindness" of material matters of fact and law, which, without such imputation, the delegation of such enhanced presumptions and preferences accorded government-cloaked attorneys and government-cloaked entities would constitute a violation of "due process of law."

FDIC's blatant fraud continued before this Court evidences disdain of any fear from a decision demanding accountability and likewise impunity of this Court imposing meaningful sanctions which could fully pierce its continued "willful blindness" and survive appeal before the Supreme Court of the United States. It is respectfully submitted that FDIC's Answer Brief fully evidences and documents the manufacturing of argument, non-responsive and disingenuous to the clear arguments and unequivocal facts to which FDIC and its counsel were charged to address in the Answer Brief filed before this Court.

FDIC's desperation and willingness to articulate deceptive arguments, regardless of the known facts which cannot in good faith be disregarded, is fully evidenced and documented in the first paragraph following "Argument," at page 8 of FDIC's Answer Brief. FDIC's deception and its strained self-serving construction of the facts commences with the first two sentences of its first paragraph following its "Argument," ibid., stating:

> The Borrowers argue that a deficiency motion was premature (Appellants' Brief at p. 10). They contend that the district court lacked the authority to issue a deficiency judgment until resolution of the

> Appeal from the final judgment of foreclosure (Appellants' Brief at p. 6,10).

This Court must not countenance government-cloaked entities and their attorneys practicing strategy of "catch me if you can" in papering over and exercising "willful blindness" to knowingly false and deceptive arguments that no reasonable person could in "good faith" maintain an honest belief or fail to recognize said argument as false and deceptive.

FDIC's first sentence stating "[t]he Borrowers argue that a deficiency motion was premature," ibid., is a blatant attempt to foist wrongful, deceptive and exculpatory construction without any basis to justify in good faith such construction. The term "premature," ibid., is nowhere scribed on page 10 of Appellants' Brief and in fact cannot be found in the entire Initial Brief filed by Appellants. Likewise, FDIC's strained and self-serving interpretation attributed Borrower's appellate position stating "[t]hey contend that the district court lacked the authority to issue a deficiency judgment until resolution of the Appeal from the final judgment of foreclosure" willfully obfuscates and knowingly misrepresents the true issues FDIC and its attorneys were charged to know, acknowledge and respond thereto.

The foregoing paragraph noting FDIC's "wrongful" and "deceptive" arguments foisted upon this Court in its Brief is fully exposed upon the unequivocal facts and clearly articulated issues of law FDIC's self-serving responsive arguments are intended to avoid. FDIC's self-serving construction of statements attributed to Borrowers are disingenuous to the clearly articulated statements of fact and law which it noted as set forth at pages "(Appellants Brief at p. 6,10)." Ibid. This Court is respectfully directed to take note of the following text from page 6 of Appellants' Brief which states:

> The above statement reflects full knowledge and understanding that the Motion for Deficiency

> Judgment (R11-300) was filed notwithstanding FDIC's acknowledgement that it was "not ripe" Id. FDIC's post appeal motions are factually significant and evidentiary on whether to impute "improper purpose" and "fraudulent intent." FDIC is charged with knowledge that fact issues avoided informed resolution, sub justice, demands de novo findings of "improper purpose" and "fraudulent intent."

This Court is specifically requested to consider the following text from Appellants' Brief at page 5 stating:

> . . . This Court is requested to note the specific acknowledgement in FDIC's Response to Defendant/Appellees' Motion to Certify Supplemental Record and Additional Time to File Initial Brief, dated December 30, 1992, filed before this Court in Appeal 92-2819. FDIC, at page 4 of its Response, Id., expressly stated the exact opposite of its position in this third appeal, to wit:
>
> > Moreover, a motion for deficiency judgment is not ripe until after this appeal is decided.

This author deems it outrageous that FDIC, its staff attorneys and its counsel of record manufacture self-serving and strained interpretation of factual and legal issues that simply cannot be reached in good faith. FDIC cannot escape accountability and proper de novo findings of knowledge and notice of prejudice to Appellants/Defendants by strategy on appeal exercising "willful blindness" to its fiduciary obligations. FDIC was charged to address and respond to issues and authority raised in Appellants Initial Brief, at page 33, noting:

> This Court has recently reviewed a lower court's entry of default and addressed the responsibilities and duties of both the party litigants and their attorneys in

proceedings before the federal district court. In Florida Physician's Ins. Co. Inc. v. Ehlers, 8 F.3d 780, 784 (11th Cir. 1993), this Court noted:

> . . . lack of diligence is easily analogized to a company's failure to establish minimal procedural safeguards. Ehlers, as a defendant in a suit alleging millions of dollars in damages, had a duty to act with some diligence to ensure that his attorney was protecting his interests. He did not do so, and we find that the district court did not abuse its discretion in finding that Ehlers did not establish good cause for his default.

The Court, Id. at 784-785, further noted:

> We conclude that the district court did not abuse its discretion in finding that Ehlers had not established good cause for his default and in denying Ehler's Rule 60(b) motion, and that adequate notice was sent to Ehlers. We AFFIRM.

> Defendants/Appellants would respectfully submit that FDIC's post appeal motion conduct would call forth the precise and sound reasoning of Ehlers demands application to the converse situation presented in the instant case of FDIC having failed to exercise minimal supervisory control, after notice, and now stand before this Court having consummated a taking of Defendants/-Appellants' property interests in direct violation of constitutional prohibitions under the Fifth, Sixth and Seventh Amendments.

Likewise, FDIC's countenance and acquiescence in filing a non-responsive Answer Brief, predicated upon self-serving interpretation of facts, law and issues that simply could not be maintained by reasonable person under similar circumstances, impute improper purpose and fraudulent intent on the part of FDIC in its corporate capacity.[5] FDIC was charged with notice of clear constitutional issue of arbitrary misapplication through fraudulent and wrongful litigation conduct to which FDIC failed to respond. This non-response is fully documented by avoidance of the arguments involving statutory construction set forth in Appellants Initial Brief, at page 13, which stated:

> This Court's case precedent denies FDIC any ability to maintain "good faith" argument seeking affirmance of the Deficiency Judgment (R11-321). In State of Ga., Dept. of Med. Assistance v. Shalala, 8 F.3d 1565 (11th Cir. 1993), the Eleventh Circuit has clearly set forth standard of review applicable to "agency's [FDIC's] interpretation of statute over which it has been delegated administrative authority [it] is entitled to deference. . . ." (bracketed notation added). In State of Ga., id. at 1567, this Court noted:
>
> > [1] The Supreme Court established the standard for an appellate court's review of agency decisions in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first step in the Chevron two-step review is to determine whether Congress has

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[5]This Court is fully cognizant of FDIC's responsibility to exercise supervisory control over its staff attorneys, agents, officers, employees and private litigation counsel to ensure that enhanced statutory presumptions and preferences are not exercised in derogation of substantive constitutional rights of Defendants/Appellants under the Fifth, Sixth and Seventh Amendments or in violation of due process of law.

> directly and unambiguously spoken to the precise question at issue. . . . Statutory interpretation is within the special competence of the courts. If congressional intent is clear and the agency action is contrary, then that action must be set aside by the judiciary. Chevron, 467 U.S. at 843 n.9, 104 S.Ct. at 2782 n.9.
>
> (footnote omitted)

> It is well established that the proper construction and application of a statute presents a question of law subject to this Court's de novo resolution. FDIC is charged with the full knowledge of the facts and applicable law disclosed upon plenary review of the case record. This Court is charged to resolve de novo whether the Deficiency Judgment (R11-321) was secured upon erroneous application of Florida Statute §702.06.

Neither FDIC, its staff attorneys or counsel of record, can justify its adversarial position seeking confirmation of lower court judgments and orders by self-serving selective response to issues that are immaterial and irrelevant to the genuine issues which FDIC, as a matter of law, was charged to know, understand and respond thereto.

FDIC's Answer Brief is charged to respond to the genuine issues and comply with the 11th Circuit Court Rules at Addendum Eight and comply with "Rule 1. Standards for Professional Conduct," which specifically notes:

> . . . the rules of professional conduct adopted by the highest court of the state(s) in which the attorney is admitted to practice to the extent that those state rules are not inconsistent with the American Bar Association Model Rules of Professional Conduct, in which case the model rules shall govern.

The genuine issues raised before this Court in Appeal 92-2819 specifically identified pleadings and discovery responses which called forth misapplication of unique statutory authority of 12 U.S.C. §1823(e) that precludes otherwise available defenses and counterclaims. FDIC's Answer Brief is an attempt through "willful blindness" to paper over express statutory mandate imposing fiduciary duties under 12 U.S.C. §1823(d)(3)(C).

It is further submitted that FDIC's Answer Brief violates the "Rules Regulating the Florida Bar," said Rules pertinent to the instant case, set forth as follows:

Rule 4-3.1 Meritorious claims and contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. . . .

Rule 4-3.3 Candor toward the Tribunal

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to the tribunal.

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

Rule 4-3.4 Fairness of opposing party and counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably

> should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.
>
> . . . .
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

The foregoing "Rules Regulating the Florida Bar" are deemed uniquely applicable to the non-responsive Answer Brief which serves to maintain an adversarial position in direct contravention of statutory mandate under 12 U.S.C. §1823(d)(3)(C) which demands continuing fiduciary obligation from FDIC, its staff attorneys and counsel of record to refrain from taking advantage of prejudice occasioned by prior and known misapplication of statutory preferences and rules of court applicable to the orders and judgments upon which the Deficiency Judgment (R11-321) simply cannot stand. FDIC's litigation conduct before this Court has extended far beyond the boundaries of misfeasance, and now demands de novo findings of malfeasance on the part of FDIC, its staff attorneys and counsel of record.

The issue noted at page 8 of FDIC's Answer Brief stating "The District Court Had Jurisdiction To Issue the Deficiency Judgment" simply cannot be maintained in "good faith" as responsive to the facts, law and issues clearly set forth in Appellants' Initial Brief filed before this Court. FDIC's "willful blindness" and its self-serving manufacturing of illusory issues to which it could respond serves only to wrongfully avoid acknowledging its litigation misconduct sub justice and before this Court. FDIC's failure to acknowledge prejudice occasioned by a deceptive Complaint, false Answer, false denial in Response to Request for Admissions,

and evasive Answers to Interrogatories, all said matters required to be accorded truthfulness when lower court orders were entered sub justice. FDIC is now denied the ability to maintain a "good faith" adversarial status seeking confirmation of the Deficiency Judgment (R11-321) which, if sustained, must stand or fail upon the lower court's Order (R8-232) which was entered prior to and without consideration of belated acknowledgement by Frank H. Thaxton at his 30(b)(6) deposition testimony. See Appellants Initial Brief in Appeal 92-2819 at page 2. Thaxton's deposition documents FDIC's knowledge of falsity of the facts set forth in pleadings and discovery responses which the lower court was required to accord truthfulness thereto.

FDIC's Answer Brief, utilizing "willful blindness", would have this Court confirm the Deficiency Judgment (R11-321) upon the product of poison fruits of its undetected fraud which this Court declined in Smith v. Duff and Phelps, Inc., 5 F.3d 488, 491 (11th Cir. 1993), stating:

> In reviewing this case we are reminded that "[p]utting a saddle on a duck does not make it a horse." Smith v. Morgan, 235 S.W.2d 938, 942 (Tex. Civ. App. — San Antonio 1950, error dism'd) (Pope, J., concurring). Here, the "directed verdict" saddle seems singularly inappropriate on the back feathers of the proceedings below. Whatever the parties and the court chose to call what they were doing, the posture of the case was summary judgment. We must unsaddle the duck and review the summary judgment that the court granted in favor of the defendants on the limitations issue.

This Court "must unsaddle the duck and review the summary judgment" Ibid., and further enter such de novo findings necessary to deter FDIC, or any other government cloaked agency, seeking to paper over issues of fraud, bad faith and constitutionally repugnant litigation conduct, acknowledgement of same demanded to ensure "due

process." The integrity of proceedings before the Federal District Courts and before this Court cannot depend on an over-burdened judiciary to pierce the veil of obfuscation FDIC willingly gambles cannot be pierced.

FDIC is perceived to utilize self-serving manufactured argument, not only to secure affirmance on appeal, but also to manufacture exculpatory issues serving only to further obfuscate through "willful blindness" issues of state of mind beyond this Court's ability to sustain de novo findings necessary to survive Supreme Court affirmance of any deterrence sanctions this Court may seek to impose against FDIC. It is understandable that FDIC is reluctant to address the facts and law to which FDIC was charged to respond when such response would document and remove all doubt that FDIC in its corporate capacity, its agents, officers, employees and its counsel of record, had full knowledge of said issues.

The allegations of the foregoing paragraph and FDIC's failure to respond were in fact anticipated, addressed in Appellants' Initial Brief, at page 11, specifically admonishing the following:

> FDIC stated in its Answer Brief filed before this Court in Appeal 92-2819, page 22, **"Mortgage Foreclosure Does Not Violate The Constitution."** It is submitted that FDIC's foregoing statement evidences "willful blindness" to the unequivocal notice of the real and genuine issues clearly articulated in motion proceedings sub justice and such "willful blindness" in FDIC's Answer Brief imputes fraudulent intent to avoid genuine issues raised in Appellants' Initial Brief filed before this Court in Appeal 92-2819. Appellants would submit that any attempt of FDIC to assert response argument in the present case that the state statutory authority **"Does Not Violate The Constitution"** must not be countenanced by this Court. The genuine issue before this Court is not the unconstitutionality of the statutory authority relied

> upon by Magistrate Jenkins, id., but rather genuine issues of FDIC's fiduciary duty to acknowledge litigation misconduct, procedurally avoided and unresolved in proceedings sub justice, when due process and established Rules of Professional Responsibility demanded acknowledgement and response. FDIC cannot avoid knowledge and accountability for documented facts and unresolved legal issues which were pending before this Court at the time it sought and secured the Deficiency Judgment (R11-321).

It appears patently obvious to this author that FDIC, its staff attorneys, its Office of the Inspector General and its counsel of record willingly, knowingly, and charged with full knowledge of the admonition set forth in Appellants' Initial Brief, ibid., challenge this Court to "catch me if you can." It should not be lost upon this Court that for the first time in this author's memory, FDIC's counsel of record has filed a document before this Court (e.g. Answer Brief) specifically omitting from its Certificate of Service copy to FDIC's corporate counsel. No doubt FDIC could argue in removing Robert N. Winick from their Certificate of Service that corporate counsel was inadvertently removed from said Certificate. Notwithstanding, this author finds said omission imputes improper purpose and fraudulent intent to manufacture issues for appeal that are uniquely suitable to exculpatory argument before the Supreme Court of the United States asserting lack of knowledge or notice upon this Court's de novo findings and imposition of reasonable deterrence sanctions against FDIC.

FDIC's argument in the second paragraph of its two-paragraph "Argument" at page 8 of its Answer Brief once again utilizes "willful blindness" to the genuine issues raised in Appellee's Initial Brief and to which FDIC was charged to respond in its Answer Brief. It is an insult to the intellectual integrity that must be demanded of government-cloaked entities and attorneys appearing before the Court on their

behalf to fail to respond to clearly identified issues that orders and judgments upon which FDIC must rely were entered upon erroneous application of facts and plain error of applicable law occasioned by FDIC's litigation misconduct sub justice.

It is deemed evidentiary as to the total untenability of FDIC's position that their selective response to self-serving issues, when actually raised in Appellants' Initial Brief, said argument fails to stand critical analysis for the proposition FDIC would have this Court resolve in its favor. FDIC, at page 8 of its Answer Brief, states:

> . . . Rule 62(d) of the Federal Rules of Civil Procedure provides for the stay of execution of a judgment where an appeal is taken on the condition that the appellant post a supersedeas bond. Here, the borrower never posted a bond and the district court denied their motion for a stay under Rule 62. This Court also denied their Motion for Stay under Rule 8 of the Federal Rules of Appellate Procedure.[4]
>
> ---
>
> [4]In connection with their request for a Stay, the Borrowers raised the same allegations of unfairness and bad faith actions by the FDIC upon which they base their "ripeness" argument. In denying the Stay this Court rejected those allegations.

FDIC's self-serving interpretation of "Rule 62(d)," ibid., and notation that ". . . the borrowers never posted a bond and the district court denied their motion for a stay under Rule 62" "begs the issue" and avoids genuine issue of FDIC having knowingly, wantonly, maliciously and fraudulently obstructed the lower court's ability to render an informed resolution of Defendants/Appellants' "motion for a stay," ibid., upon equitable considerations which required understanding of true facts and applicable law denied informed consideration upon successful product of FDIC's

fraud and nondisclosure of material information buried in voluminous case record beyond the reach of The Honorable Anne C. Conway, the third successive judge in the case sub justice, over-burdened with a voluminous case docket, and necessarily compelled to rely upon the integrity of prior orders and judgments.

It is deemed both contemptuous and specious for FDIC to utilize as authority in support of its argument the statement that "[t]his Court also denied their Motion for Stay under Rule 8 of the Federal Rules of Appellate Procedure," Ibid. The foregoing statement, ibid., further evidences a footnote set forth in the full indented quoted text, ibid., and likewise documents contemptuous, specious and wrongful obfuscation. This Court's resolution in FDIC's favor and denial of Appellants' "Motion for Stay under Rule 8," ibid., has no probative value in support of the genuine issues, subject to this Court's de novo resolution upon the merits.

FDIC's assertion attributing to Defendants/Appellants' at its footnote 4, ibid., ". . . the Borrowers raised the same allegations of unfairness and bad faith actions by the FDIC upon which they base their 'ripeness' argument" and in further stating, "[i]n denying the Stay this Court rejected those allegations," ibid., demands de novo findings of willful, wanton and malicious intent to consummate a fraud upon this Court. The foregoing conclusory assertion is deemed fully supported by FDIC's "willful blindness" and perversion of the clear and unambiguous acknowledgement by FDIC, not the Defendants/Appellants, specifically noted at page 4-5 of Appellants' Initial Brief, stating:

> . . . The aforenoted post appeal Motions filed of record with the Clerk of the Eleventh Circuit Court of Appeals are deemed of critical significance in proper consideration of de novo issues raised in this third appeal. The significance and relevancy of the appellate motion proceedings in appeal 92-2819 are most evident in the words set forth at page 4 of FDIC's Response to Supplemental Record, Id., stating:

> "Moreover, a motion for deficiency judgment is not ripe until after this appeal is decided." (emphasis added)

This Court must not countenance flagrant deceptions by government-cloaked entities (i.e., FDIC) in filing and maintaining adversarial posture on appeal or through such countenance place in jeopardy the fundamental integrity of the appellate process charged to detect and preserve inviolate constitutional restraints and ensure the Administration of Justice.

This Court should not countenance FDIC's foisting clearly distinguishable case precedent upon this Court nor accord any legitimacy whatsoever as evidentiary that such authority provides grounds for "good faith" belief in FDIC's maintaining an adversarial posture in the instant case. Established Rules of Professional Responsibility deny FDIC the ability to utilize in "good faith" clearly distinguishable case authority and such misconduct is fully evidenced at page 9 of its Answer Brief, stating:

> It is well established that under Florida law, a judgment creditor is entitled to a deficiency judgment if the value of the security on the date of sale is less than the amount of the final judgment. Norwest Bank v. Mi[l]lard, 522 So 2d 546 (Fla. 4th DCA 1988). The amount of a deficiency judgment is calculated by determining the amount unpaid on the mortgage, less the fair market value of the property securing it, absent some unusual legal or equitable principle to justify reducing the deficiency amount. Id. at 547. A mortgage holder is entitled to a deficiency judgment, in the absence of unusual equitable circumstances. Federal Deposit Insurance Corporation v. Hy Kom Development Co., 603 So2d 59,60 (Fla. 3d DCA 1992), review denied, 618 So2d 209 (Fla. 1993). (Bracketed [] notation added to correct scrivener's error.)

The probative value as precedent of the Millard case, designated as controlling authority by FDIC in its Answer Brief, simply cannot stand critical analysis or support any inference of "good faith" belief that said authority supports affirmance of the Deficiency Judgment (R11-321) subject of the instant appeal. The Millard case is fully distinguished by the issues identified in Appeal No. 92-2819 and post appeal issues identified in the instant appeal which FDIC's non-responsive Answer Brief fails to address. The Millard case, id. at 522 So.2d 546, simply "[r]eversed and remanded with directions" evidencing the Fourth District Court of Appeal of Florida having not found "any legal or equitable principle justifying his refusal to follow the general rule. . . ." In the instant case FDIC cannot avoid through "willful blindness" and evasive non-responsive argument to genuine issues of fact and law no reasonable person, similarly situate, could fail to recognize.[6]

FDIC's simplistic argument setting forth the correct statement of the established law set forth in the Hy Kom case has no probative value whatsoever in support of maintaining a "good faith" adversarial posture seeking affirmance of the Deficiency Judgment (R11-321) subject of the instant appeal. It is not the mathematical computation in

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[6]FDIC, by clear statutory mandate of 12 U.S.C. §1823(d)(3)(C), was charged with fiduciary obligations and duties. Likewise, FDIC was charged at all material times with actual knowledge of the specific factual elements necessary for informed resolution and application of 12 U.S.C. §1823(e), which accorded FDIC statutory preference which precluded otherwise valid Affirmative Defenses and Counterclaims when said statute applied to the facts of a given case. It is contumacious and demands de novo findings of fraudulent purpose, continuing into the appellate process, for FDIC to fail in acknowledging prejudice occasioned by false pleadings, evasive discovery responses, and erroneous findings of fact which occasioned misapplication of law by the lower court. FDIC had fiduciary mandate, at all material times in proceedings before the lower court and in all proceedings before this Court, to acknowledge prejudice occasioned by its own actions and omissions, including all actions and omissions of its predecessors, and refrain from seeking advantage upon product of such "actions and omissions."

determining deficiency amount but rather the genuine issues of FDIC's knowingly seeking and securing the Deficiency Judgment (R11-321) with full notice and knowledge that said Deficiency Judgment (R11-321), if granted, would stand upon undetected fraud and further obfuscate issues that were before this Court in appeal 92-2819. FDIC cannot escape this Court's de novo finding of fraudulent intent and arbitrary misapplication of otherwise constitutional statutory authority occasioned by FDIC filing its Motion for Summary Judgment (R9-252-1) seeking clarification of prior Order (R8-232-2). FDIC, its staff attorneys and counsel of record, have long lost ability to deny knowledge that in securing Summary Judgment (R10-279) upon clarification of prior Order (R8-232-2) FDIC insidiously avoided from consideration the 30(b)(6) deposition testimony of Frank H. Thaxton. This conduct constitutes blatant fraud upon The Honorable Judge Anne C. Conway, the third successive judge, overburdened with a burgeoning caseload and charged to rely on integrity of previous Order (R8-232-2). FDIC's fraud occasioned Judge Conway's failure to properly consider Thaxton's belated acknowledgement of material facts rendering said prior Order (R8-232-2) void as a matter of law. See V.T.A., Inc. v. Airco, Inc., 597 F.2d 220 (1979).

FDIC evidences deliberate indifference to both ministerial and managerial obligations to well established Congressional statutory authority in asserting responsive argument serving sole purpose of propounding a correct argument for computation of a deficiency amount, which, if entitled to a deficiency judgment, said computation and argument in support thereof would unquestionably validate such amount so calculated. However, it is deemed outrageous and evidentiary of willful, wanton and deliberate indifference to foist Morley as case precedent in the instant case where the genuine issue raised in Appellant's Initial Brief and calling forth a response in FDIC's Answer Brief is not the computation of the amount of deficiency but rather calling forth a response addressing FDIC's having knowingly sought and secured the deficiency judgment upon known product of

fraudulent and constitutionally repugnant litigation misconduct that went undetected before three successive lower court district judges charged to accord FDIC preferences and presumptions which foreclosed consideration of material facts, said facts known to FDIC and its agents and withheld from proper consideration by the lower court judges when entering the Orders and Judgments upon which the validity or invalidity of the deficiency judgment must necessarily stand.

This author deems specious FDIC's representations that the accounting arguments and documentation presented at the hearing before the magistrate to determine deficiency amount was not disputed by the Appellants or their counsel. FDIC's arguments that an "evidentiary hearing" at Page 10 of their Answer Brief is deemed a flagrant attempt to manufacture self-serving issues presenting colorable argument which, if unrebutted, would provide exculpatory issue on appeal of any deterrent sanctions compelling at the very least a remand and further proceedings to resolve elusive factual issues of state of mind.

Likewise, FDIC's utilization of the deficiency hearing transcript at Pages 10-11 of their Answer Brief serves only to obfuscate genuine issues and manufacture self-serving elusive issues serving only one purpose to further obfuscate and deny the Honorable Justices of the 11th Circuit to render swift, full and final resolution of the instant case without necessity of further proceedings. The utilization of Morley as precedent following the notation of the deficiency proceedings, supra, violates minimum Canons of Ethics when foisting the authority of Morley for the substantive relief requested immediately following said authority, ibid, asserting "[t]he deficiency judgment should be affirmed." FDIC, its staff attorneys and their counsel of record are charged with full knowledge that Morley has absolutely no value as precedent in support of this Court affirming the deficiency judgment presently before this Court.

FDIC's self-serving characterization at Page 11 of its Answer Brief that "NO EQUITABLE CONSIDERATIONS

JUSTIFY REDUCTION OF THE AMOUNT OF THE DEFICIENCY JUDGMENT" is non-responsive and properly evidentiary for this Court to impute fraudulent intent on the part of FDIC, its staff attorneys and counsel of record. Furthermore, FDIC's assertion at Page 11, that "[t]he District Court rejected the arguments now raised on appeal that FDIC's alleged bad faith activities deprived them of their real property (Appellants Brief at p. 35-42)" further documents deliberate obfuscation and fraudulent intent to manufacture strained illusory issues inapposite to minimal standards of construction applicable to the "District Court"'s rulings. FDIC is charged with actual notice that Orders and Judgments upon which it necessarily must rely in support of its conclusory arguments utterly fail to document informed consideration of "equitable issues" and in fact the Orders and Judgments sub justice clearly document all factual, constitutional, legal and equitable issues asserted by the Defendants/Appellants were precluded from consideration by the lower court. It is contumacious and demands de novo findings of fraudulent intent on the part of FDIC, both sub justice and before this Court, for FDIC to exercise willful blindness and assert the specious responsive argument to its own self-serving manufactured issue asserting ". . . Appellants never claimed, as they do now in the appeal, that the Federal Statute at 12 U.S.C. §1823(e) is unconstitutional." (Appellees Brief, page 11, footnote 6). FDIC's mischaracterization of the constitutional issues to that of the statute as opposed to its arbitrary, capricious and unreasonable litigation conduct securing misapplication of statutory authority must not be countenanced, and demands de novo findings of fraudulent intent. FDIC's arguments before this Court threaten the integrity of the appellate process.

This Court's own case precedent denies FDIC any sanctuary or according any inferences of good faith to FDIC's self-serving non-responsive arguments foisted upon this Court. FDIC's assertion that "[t]his Court's predecessor has ruled that the failure to allege Constitutional defenses below

precludes the appellants from raising them for the first time on appeal" evidences disdain of any accountability before this Court by FDIC, its staff attorneys, officials and counsel of record.

This Court's analysis of the case record on appeal and the briefs filed by the parties shall disclose that FDIC's self-serving constitutional arguments expressly contradict the clearly articulated issues as set forth in Appellants Brief. Likewise, the lower court case record before this Court documents constitutional issues addressed in plethora of motions resolved sub justice, and in fact were expressly set forth in Amended Counterclaim which was denied by the third successive judge, The Honorable Anne C. Conway, said denial of Leave to File Amended Counterclaim under Defendants/Appellants theory of the case occasioned upon the "poisoned fruits" of FDIC's successful papering over and rendering informed resolution impossible. FDIC's constitutional arguments would seek to deny appellate review of constitutional issues that their fraudulent and "bad faith" litigation conduct avoided from proper consideration sub justice. Established Maxims in Equity establish that FDIC cannot profit upon the fruits of its own misconduct. Furthermore, this Court's binding case precedent in Baumann v. Savers Federal Sav. & Loan Assoc., 934 F.2d 1506 (11th Cir. 1991) clearly establishes this Court's authority and necessity for proper resolution of all constitutional issues identifiable in the voluminous case record subject to this Court's plenary review. See Appellants Initial Brief in Appeal 92-2819, pgs. 31, 32, 38, and 40.

FDIC's strained naivete in failing to acknowledge or otherwise evidence any recognition that the constitutional issue is not the constitutionality of the Statutes identified in plethora of motion proceedings sub justice and in Appellants Initial Brief subject of FDIC's Answer Brief, but rather FDIC's fraudulent, arbitrary and malicious litigation conduct in seeking and obtaining misapplication of well established statutory authority in derogation of substantive Constitutional Rights secured under the 5th, 6th and 7th Amendments.

FDIC's self-serving construction of the constitutional issue to which it has elected to answer imputes blatant contempt and documents contumacious continuation of constitutionally repugnant litigious conduct threatening the very integrity of the appellate process designed to expose, detect and deter all those who would willingly seek to abridge the Constitution.

This author deems it particularly offensive and evidentiary of FDIC's fraudulent intent to assert at footnote 7 on Page 12 of its Answer Brief articulation from the Magistrate Judge's Order entered March 24th, 1992. It is beyond credulity for FDIC's exercising "willful blindness" to the genuine issues of prejudice occasioned by statutory presumptions and preferences accorded FDIC's Complaint, Answer and discovery responses which FDIC had fiduciary duty to ensure were fully understood and not susceptible to misapplication by the lower court judges. FDIC's fiduciary duties and responsibilities were called forth the day FDIC was substituted as Party Plaintiff and at all material times have remained and shall continue through final appellate resolution. FDIC's seeking affirmation of the deficiency judgment before this Court is violative of the clear statutory mandate of 12 U.S.C. §1823(d)(3)(C) imposing upon FDIC ministerial fiduciary responsibilities that are not subject to good faith interpretation or otherwise subject to discretionary application.

CONCLUSION

The Honorable Judges of the 11th Circuit are respectfully requested to issue an Opinion and Mandate against FDIC and in favor of Defendants/Appellants providing relief upon each and every request identified in the Conclusions of Appellants Initial Briefs filed in Appeal 92-2819 and the instant Appeal 93-3492. Let this Court further resolve and exercise its inherent powers in equity to structure its Opinion and Mandate to ensure swift, complete and final

appellate resolution of all issues identifiable in the voluminous case record on appeal.

Respectfully Submitted

/s/Daniel K. Schaffner
Daniel K. Schaffner, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief of Appellants and Record Excerpts have been served, by U.S. Mail, postage pre-paid, this 18th day of July, 1994 to the following addressees:

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/s/Daniel K. Schaffner
Daniel K. Schaffner, Esq.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 92-2819

NO. 93-3492

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for Audubon Federal Savings & Loan Association, Plaintiff

versus

LAKE TARPON RESORT, INC., AL-KELANI, INC. ALAN BRAITHWAITE, DOUGLAS AND ANTOINETTE IREDALE, GEHAD AND HASHIM AL-KELANI
Defendants

On Appeal from the United States District Court for the Middle District of Florida

SUGGESTION OF REHEARING EN BANC

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2819

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FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as Receiver for Audubon Federal Savings & Loan Association, Plaintiff

versus

LAKE TARPON RESORT, INC., et. al.
Defendants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 FRAP, I hereby certify that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal No. 92-2819 and 93-3492:

Al-Kelani, Inc.
Gehad Al-Kelani
Hachim Al-Kelani
Audubon Federal Savings and Loan Association
Alan J. Braithwaite
The Honorable William J. Castagna
C.E.S. Industries, Inc. d/b/a Consolidated Electric
The Honorable Anne C. Conway
Federal Deposit Insurance Corporation, as Receiver for
Audubon Federal Savings and Loan Association
Federal Deposit Insurance Corporation,
in its corporate capacity

LAKE TARPON RESORT, INC. et al.
v FDIC Appeal No. 92-2819 and 93-3492

Federal Savings and Loan Insurance Corporation
Hawkins Construction Company, Inc.
Antoinette Iredale
Douglas Iredale
The Honorable Elizabeth A. Jenkins
Lake Tarpon Resort, Inc.
Roger Meagher, Esquire
RCA Service Co.
Daniel K. Schaffner, Esquire
The Honorable Harvey E. Schlesinger
Neal A. Sivyer, Esquire
U.T. Communications Credit Corporation
Robert M. Winick, Esquire
Robert C. Boatwright
Charles P. Hunt
Leslie J. Hunt
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STATEMENTS OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Beacon Theatres, Inc. v. Westover, 359 U.S., 500, 510 79 S.Ct., 948, 956, 3 L.Ed.2d 988 (1959).

Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 399, 17 L.Ed.2d 235 (1966).

Chambers v. NASCO, Inc., 501 U.S. ___, 115 L.Ed. 2d 27, 53, 111 S.Ct. 2123, 2139-40 (1991).

Coit Independence Joint Venture v. First South, F.A., 103 L.Ed. 2d 602, 623, 109 S.Ct. 1361, 1371 (1989).

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed. 2d 359 (1990).

Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 1951-52, 1956 (1969).

Salve Regina College v. Russell, 499 U.S. ____, 113 L.Ed. 2d 190, 202, 111 S.Ct. 1217, 1224 (1991).

Warth v. Seldin, 422 U.S. 490, 499, 45 L.Ed.2d 343, 95 S.Ct. 2197, 2205 (1975).

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I.
STATEMENT OF THE ISSUE(S) ASSERTED TO MERIT EN BANC CONSIDERATION

1. Whether FDIC's ability to secure a favorable panel decision upon grounds of mootness, without opinion or findings, is directly contrary to binding Supreme Court case precedents, and threatens the integrity of the judiciary and public confidence in securing fair and well reasoned disposition of cases fully supported by findings of fact and law.

2. Whether sound judicial and public interest, embodied in binding case precedent, deny FDIC the ability to render moot, substantive de novo issues that are demanded for this Court to carry out its Article III mandated responsibilities.

II.
STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Audubon Federal Savings and Loan Association ("Audubon") instituted, on December 11, 1985, the subject mortgage foreclosure action against Lake Tarpon Resort, Inc., et al, in the Circuit Court for Pinellas County, Florida. At the time the state court foreclosure action was filed, Audubon was a federal savings and loan association based in Louisiana.

On or about June 20, 1986, Audubon was declared insolvent by the Federal Home Loan Bank Board (hereinafter "FHLBB") and the Federal Savings and Loan Corporation (hereinafter "FSLIC") was appointed as a receiver for Audubon. Thereafter, FSLIC substituted itself for Audubon as a party-plaintiff and on June 18, 1986, FSLIC removed this foreclosure action to federal court for the Middle District of Florida, Tampa Division. Defendants filed their answer to Plaintiff's Complaint, jury demand, affirmative defenses and counterclaim on or about November 21, 1986 (R1-14-1).

Plaintiff's Complaint (R1-3-1-10) at Count 1, set forth a claim for relief predicated upon expressed theory of contract pursuant to the express mortgage documentation specifically attached to Plaintiff's Complaint. The Complaint at Count 2 sought money damages predicated upon express theory of contract pursuant to the terms of promissory note and express mortgage documentation attached to Plaintiff's Complaint.

FSLIC and the FHLBB were abolished by Congress in passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. FDIC, pursuant to the 1989 Congressional legislation, 12 U.S.C. §1821a, was made manager of the FSLIC Resolution Fund. The FSLIC's assets and liabilities were transferred to the FDIC. 12 U.S.C.§1821a(a)(1) and (2)(A). Congress expressly charged FDIC with "fiduciary duties and obligations of the Corporation as receiver to claimants against the insured depository institution in receivership". 12 U.S.C. §1823(d)(3)(C). The lower court's May 4, 1990 Order (R5-121-1) provided that "FDIC is hereby substituted as party plaintiff in place of FSLIC".

FDIC, as a federal receiver, substituted as party plaintiff in the lower court proceedings, was placed on actual notice of prior filings appearing in the case record disclosing Defendants assertion of FSLIC's "unclean hands" (R3-68-12), "waste" (R3-68-13), "abuse by FSLIC's agents" (R3-68-13) which were submitted in support of the "courts . . . 'inherent authority'" (R3-68-13) to protect Defendants against arbitrary decisions.

On June 27, 1989, FSLIC filed motion to strike (R3-73) the affirmative defenses of Defendants and motion to strike (R3-75) Defendants' claims for attorney's fees. FSLIC utilized unique statutory authority and case precedent according preferences to a federal receiver in its memoranda (R3-74 and R3-76) filed in support of its motions to strike. Al-Kelani, Inc., filed its response to FSLIC's motions to strike on July 24, 1989 (R3-84).

The Honorable Judge Harvey E. Schlesinger entered Order (R8-232-2) striking Defendant's affirmative defenses. At the time the lower court entered its Order (R8-232-1-2) the case had been pending for years before the bench, reflecting a case record into its eighth volume, and entered by said federal district judge facing a congested docket which had already necessitated an emergency order suspending civil trials (See, Emergency Motion [R7-185-9] to Expunge Lis Pendens and Sanctions at Appendix 1). Defendants, Al-Kelani, Inc., filed motion with memorandum in support for leave to file answer and amended counter-claim with said answer and amended counter-claim simultaneously filed and received by the court (R10-267). The answer and amended counter-claim raised and sought recovery upon equitable contractual and constitutional grounds. The District Judge denied leave to file answer and amended counter-claim upon the sole ground of latches (R10-279).

The Honorable Judge Anne C. Conway granted summary judgment upon Plaintiff's seeking clarification and without consideration of subsequent discovery to confirm or deny the continuing validity of prior Order (R8-232-2) granting Plaintiff's motion to strike affirmative defenses. The lower court is asserted to have erred in failing to apply plenary review of subsequent discovery to prior Order (R8-232-1-2), made necessary by virtue of the fact that FDIC utilized Judge Schlesinger's Order (R8-232-2) in proceedings before the Honorable Judge Anne C. Conway, as grounds for "clarification" and securing her Order (R10-279-2) granting FDIC summary judgment.

The lower court's summary resolution, without trial, pursuant to its Order (R10-279), is asserted the product of a deceptive Complaint, wrongfully filed by FDIC's predecessor, FSLIC, and a product of FDIC having successfully papered over its predecessor's "deception". Al-Kelani, Inc., and all individual Defendants filed motion (R10-282) which sought interlocutory review under 28 U.S.C. §1292(b) and alternatively certification under Rule 54(b) of the Federal Rules of Civil Procedure. FDIC filed memorandum (R10-284)

in opposition to the interlocutory relief sought by the Defendants. The lower court's Order (R10-285) denied Defendants' interlocutory appellate relief.

The lower court, on August 18, 1992, entered Final Judgment of Foreclosure (R10-286) predicated on its previous Order (R10-279), which was likewise predicated upon previous Order (R8-232). Neither one of the Orders, (R8-232) or (R10-279), provided findings of fact or opinion of law in support of the necessary conclusions for entry of Final Judgment of Foreclosure (R10-286). The lower court is asserted to have erred as a matter of law when it summarily resolved in FDIC's favor, without trial or evidentiary hearing, the genuine issues of Plaintiff's violating express statutory mandate, breach of contract, equitable issues and constitutional issues raised in Defendants' motions filed in the lower court proceedings.

Al-Kelani, Inc., and all individual Defendants timely filed their notice of appeal of the Court's (R10-279) Order and further timely filed their appeal of the Court's (R10-286) Final Judgment of Foreclosure in favor of FDIC.

The Eleventh Circuit Court of Appeals by per curiam decision without opinion has now dismissed Appeal No. 92-2819 as being moot, and resolved in favor of FDIC Appeal No. 93-3492 of deficiency judgment which, is well founded, is deemed to necessarily stand or fail upon the de novo issues that were subject to resolution in Appeal No. 92-2819.

III.
STATEMENT OF FACTS

The Complaint was predicated upon a mortgage, contemporaneous note attached to the mortgage, certain security agreements, and "additional collateral" pledged under mortgage guarantee documentation in conjunction with an Eight Million Dollar ($8,000,000.00) loan for construction and development of a Hotel Resort Complex on Lake Tarpon in Pinellas County, Florida. To evidence the loan, the

borrowers executed a note, mortgage, construction loan agreement, and other loan documents.

The mortgage and note executed by borrowers in favor of Audubon Federal Savings and Loan Association was specifically alleged in paragraph 3 of Plaintiff's Complaint (R1-3-1-2) and attached as Exhibit B. The borrowers and Audubon duly executed a Construction Loan Agreement, expressly noted at paragraph 4 of Plaintiff's Complaint (R1-3-2) asserting "a true copy of which is attached to this Complaint as Exhibit C". Plaintiff did not attach to its Complaint a "true copy" of the Construction Loan Agreement, said Construction Loan Agreement was attached to Plaintiff's Complaint and served upon Defendants without attachment of the Enterprise documents specifically identified in said Construction Loan Agreement.

Plaintiff's Complaint (R1-3-4-5) set forth as part of its "general allegations common to all counts", at paragraph 24, specific and precise predicate for its claim pursuant to express contract documentation specifically alleged as having been "pursuant to Borrower's instructions". The attached documentation referenced at paragraph 24 of Plaintiff's Complaint sought recovery under documentation between "Hawkins Construction, Inc., Lake Tarpon Resort, Inc., and Audubon Savings and Loan." Lake Tarpon Resort, Inc., was not a borrower, and not one Defendant signed the documentation attached to Plaintiff's Complaint at paragraph 24 upon which Plaintiff has secured entry of summary judgment order and final judgment of foreclosure.

The Construction Loan Agreement, executed by all borrowers and Audubon, as part of the mortgage loan documentation, attached as Exhibit C to Plaintiff's Complaint, specifically referenced the note and mortgage and provided at page 1 of the Construction Loan Agreement that "the note and mortgage are intended to evidence and secure said construction loan". The Construction Loan Agreement attached to Plaintiff's Complaint and caused to be served by Plaintiff upon the Defendants, while Plaintiff stood before the Court as the duly appointed federal receiver for Audubon,

failed to attach the originally agreed Enterprise Building documentation identified at paragraph 3, page 2 of said Construction Loan Agreement.

The federal receiver was in exclusive possession of the only fully executed documentation of Audubon's execution and approval of Enterprise documentation originally attached to the Construction Loan Agreement; and disclosure of same was necessary to properly overcome the statutory authority of 12 U.S.C. §1823(e) and the case authority of D'Oench Duhme.

It is a fact that FDIC has repeatedly asserted that borrowers executed continuing and unconditional guarantees when, in fact, Al-Kelani, Inc., never executed a continuing and unconditional guarantee. It is a fact that Al-Kelani, Inc., and other borrowers were precluded from filing proper procedural motion under FRCP 12(b)(6) by virtue of FDIC's maintaining its unamended Complaint, responses to requests for admissions, and filing of its answer at paragraph 25 specifically denying Enterprise documentation. Furthermore, it is unequivocal that the lower court record is devoid of any well reasoned analysis or findings of fact in justifying or explaining the plethora of procedural motions resolved without opinion or analysis.

It is unequivocal fact that FDIC had ministerial duty under clear statutory mandate that "the Corporation shall continue to be subject to the fiduciary duties . . . to claimants . ." 12 U.S.C. §1823(d)(3)(C), and statutory mandated obligations to "pay all valid credit obligations of the association", 12 U.S.C. §1729(b)(1)(B), to "liquidate its assets in an orderly manner", §1729(b)(1)(A)(v), and to "settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith", §1729(d).

IV.
ARGUMENT
ISSUE ONE

WHETHER FDIC'S ABILITY TO SECURE A FAVORABLE PANEL DECISION UPON GROUNDS OF MOOTNESS, WITHOUT OPINION OR FINDINGS, IS DIRECTLY CONTRARY TO BINDING SUPREME COURT CASE PRECEDENTS, AND THREATENS THE INTEGRITY OF THE JUDICIARY AND PUBLIC CONFIDENCE IN SECURING FAIR AND WELL REASONED DISPOSITION OF CASES FULLY SUPPORTED BY FINDINGS OF FACT AND LAW.

It is respectfully submitted that binding case precedent of the Supreme Court denies FDIC ability to escape proper appellate review upon grounds of mootness. In Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 1951-52, 1956 (1969), the Supreme Court noted:

> "[3,4] Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. See E. Borchard, Declaratory Judgments 35037 (2ed. 1941). Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. See United Public Workers of America v. Mitchell, 330 U.S. 75, 86-94, 67 S.Ct. 556, 562, 566, 91 L.Ed. 754 (1947); 6A J. Moore, Federal Practice Para. 57.13 (2d ed. 1966)." . . .
>
> . . ."Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 399, 17 L.Ed.2d 235 (1966), rejects respondents' theory that

> the mootness of a 'primary' claim requires a conclusion that all 'secondary' claims are moot.". . .
>
> . . ."As was said in Kilborn, in language which time has not dimmed:
>
> 'Especially it is competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the providence and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.' 103 U.S., at 199."

It is respectfully submitted that the foregoing Supreme Court authority as articulated in Powell, id., mandates granting rehearing en banc. The Fifth Circuit has clarified its position on issues of mootness and available relief in Vieux Carre Property Owners v. Brown, 948 F.2d 1436, 1446 (5th Cir. 1991):

> "[9, 10] The Corp's arguments reflect a misunderstanding of both the doctrine of mootness and the nature of Vieux Carre's requested relief. The law is clear that a suit is moot only when it can be shown that a court cannot even 'theoretically grant' relief. Mere '[d]ifficulties in formulating a remedy in an otherwise living case do not evidence the absence of a case or controversy.' '[T]he question is not whether the precise relief sought at the time an application for injunction was filed is still available.

> The question is whether there can be any effective relief.'". . .

The instant case raises issues of FDIC's accountability and now successful avoidance of de novo issues involving Rule 11 sanctions and inherent sanctions in equity. In U.S. v. Gavilan Joint Community College Dist., 849 F.2d 1246, 1251 (9th Cir. 1988), the Court noted:

> . . ."[3] The United States contends that the federal courts cannot impose Rule 11 sanctions upon the Government due to its sovereign immunity. Although we have not previously expressly ruled whether courts may impose Rule 11 sanctions upon the Government, we have ordered the Government, pursuant to a Rule 60 motion, to recompense plaintiffs for costs and attorney's fees due to the Government's unreasonable conduct. Schanen v. United States Department of Justice, 798 F.2d 348 (9th Cir. 1986). We have also upheld monetary sanctions against the Government under Rule 37(b). United States v. National Medical Enterprises, Inc., 792 F.2d 906 (9th Cir. 1986); United States v. Sumitomo Marine & Fire Insurance Co., 617 F.2d 1365 (9th Cir. 1980)."

The inherent power of the Court to assess attorney fees against a party who maintains and prolongs litigation in bad faith and for impermissible reasons is in addition to all other statutory powers for awarding attorney fees and cost to the prevailing party.

Recently, the U.S. Supreme Court declared:

> "We discern no basis for holding that the sanctioning scheme of the statute and the rule displaces the inherent power to impose sanctions for the bad faith conduct described above. These other mechanisms,

> taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices." Chambers v. N.A.S.C.O., Inc., 501 U.S. _____, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)

The Chambers Court also stated:

> "There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney fees as a sanction for bad faith conduct." id, L.Ed.2d at 48

In discussing the inherent power of the Court and the authority of the Court under 28 U.S.C. 1927, the U.S. Court of Appeals for the Eleventh (11th) Circuit stated the reason for the sanctioning power. The Court wrote:

> "We must return to the original principle that, as officers of the Court, attorneys are servants of the law rather than servants of the highest bidder." Malautea v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993).

The Court's primary purpose is to protect the integrity of the litigation process itself; to assure fairness to all parties. This duty is especially relevant to the present issues subject to de novo review before this Court.

In Warth v. Seldin, 422 U.S. 490, 499, 45 L.Ed.2d 343, 95 S.Ct. 2197, 2205 (1975), the Court stated:

> . . ."The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . ..'" Linda R. S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). See Data Processing Service v. Camp, 397 U.S. 150, 151-154, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970)

It is uncontestable that Defendants have actual injury from real property injury from real property loss, attorney fees and deficiency judgment which this Court has ability and authority to redress. Likewise, it is well established if order on judgment found upon de novo review to have been entered in violation of due process, said order or judgment is void. If FDIC's Orders and Judgment entered sub justice are found upon proper de novo analysis to be void, the FDIC never had an asset, and this Court has power to order return of property or money flowing from said property. The foregoing clearly demand rehearing and proper appellate resolution upon all issues raised on appeal.

ISSUE TWO

WHETHER SOUND JUDICIAL AND PUBLIC INTEREST, EMBODIED IN BINDING CASE PRECEDENT, DENY FDIC THE ABILITY TO RENDER MOOT, SUBSTANTIVE DE NOVO ISSUES THAT ARE DEMANDED FOR THIS COURT TO CARRY OUT ITS ARTICLE III MANDATED RESPONSIBILITIES.

In Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S.Ct. 948, 956, the Court stated:

> . . ."'[t] the right of trial by jury as declared by the seventh amendment to the constitution or as given by a statute of the United States shall be preserved * * * inviolate.'"

It is axiomatic that significant judicial and public interest are served by this Court rehearing en banc and insuring the highest standard of review set forth in Appellant's initial brief and in pertinent part as follows:

> "The grant of summary judgment shall be affirmed 'only if no genuine issues of material fact exist and only if the moving party is entitled to judgment as a matter of law". American & Foreign Ins. v. Colonial Mtg. Co., 936 F.2d 1162, 1164 (11th Cir. 1991). The proper standard of review applicable to the lower court's summary judgment Order and final judgment of foreclosure is de novo. No deference 'whatsoever' is to be accorded the lower court's summary judgment Order and final judgment upon review by this Court. Salve Regina College v. Russell, 499 U.S. __, 113 L.Ed.2d 190, 202, 111 S.Ct. 1217, 1224 (1991).

> Issues of statutory violations and constitutional violations by FDIC raised in the lower court, resolved without evidentiary hearing or trial, are now subject to de novo review by this Court. The Rule 11 sanctions and FDIC's avoidance of deterrence sanctions, denied as moot in the lower court's summary judgment order, are now subject to de novo review. This Court may substitute its judgment for that of a court below in order to correct any error or oversight on the part of the lower court. United States v. Lawson, 809 F.2d 1514, reh'g denied, 815 F.2d 717 (11th Cir. 1987); Continental Oil Co. v. Cole, 634 F.2d 188, 191 (5th Cir.), cert.denied, 454 U.S. 830 (1981)."

In Coit Indep. Joint Venture v. Federal Sav. & Loan, 109 S.Ct. 1361, 1371 (1989), the Court noted:

> ". . . breach of fiduciary duty claims raised by Coit, like the contract disputes in Morrison-Knudsen Co., 811 F.2d at 1221, involve 'private rights' which are at the 'core' of 'matters normally reserved to Article III courts'". (Citations Omitted)

This Court is charged under its Article III mandate to resolve de novo whether FDIC knowingly sought and secured the Summary Judgment and Final Judgment of Foreclosure upon product of "willful blindness" to substantive statutory mandate of 12 U.S.C. §1823(d)(3)(C).

This Court is charged to resolve de novo whether FDIC secured upon product of erroneous resolved factual issue that substitution of the Hawkins documentation was not a "material" change. This Court is charged to resolve de novo whether the lower court erred in resolving, by summary judgment, without evidentiary hearing or trial, the genuine issue of whether the substitution of Hawkins documentation was an alteration of risk which released Defendants from further obligations under their respective guarantees. See,

Brumlow v. Pyne Corporation, 490 So.2d 1027 (Fla. 1st DCA 1986); Mohasco Industries, Inc. v. Maxwell Co., 425 F.2d 436 (5th Cir. 1970); Miami National Bank v. Fink, 174 So.2d 38 (Fla. 3rd DCA 1965); and Northwestern Bank v. Cortner, 275 So.2d 317 (Fla. 2d DCA 1973).

This Court is charged to follow the binding Supreme Court precedent set forth in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990), the Court noted:

> . . . an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.. . .

This Court's acknowledgment of the foregoing text demands en banc consideration of the voluminous twenty plus volume record consuming judicial resources since 1985 and resolving de novo whether FDIC sought to avoid binding case precedent in violation of statutory mandates, constitutional authority and fundamental fairness demanded in equity. This Court is fully cognizant of significant judicial and public interest in maintaining "a stable body of law". See, Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1510 (11th Cir. 1987).

It is deemed almost prophetic that in the Litman case at 1510, it was noted:

> . . ."Reviewing courts are better able to maintain the necessary continuity of doctrine over time. Carrington, Crowded Dockets and the Court of Appeals: the threat to the function of review and the National Law, 82 Harv.L.Rev. 542, 551-52 (1969).. . ."

The foregoing text implicates judicial awareness of disingenuous arguments upon increasingly congested appellate dockets and provides compelling justification for granting en banc rehearing in the instant case. It is respectfully submitted the de novo issues fully briefed in appeal numbers, 92-2819 and 93-3492, which avoided informed appellate resolution by three of the most distinguished judges sitting on the Eleventh Circuit, shall afford this Court unique opportunity to resolve with finality the most compelling issues facing the judiciary today. It is axiomatic that the administration of justice and the integrity of the appellate process cannot be maintained without insuring highest standards of professional responsibility of private and government cloaked agents appearing before the federal courts. It is deemed of the highest judicial and public interests that en banc consideration of the de novo issues raised by FDIC's litigation conduct before this Court be subject to informed analysis and final resolution.

VI.
CONCLUSION

It is respectfully submitted that de novo review by the Eleventh Circuit Court en banc is necessary to insure analysis commensurate with the significant judicial resources consumed in the years of litigation which created the voluminous appellate record. Judicial interest in officers of the Court willingness to risk hardship to maintain the integrity of the Courts provides further compelling justification for en banc review. En banc review of the appellate record in this case is justified to properly address de novo issues of FDIC's knowingly accepting losses and risks of multi-million and multi-billion dollars to secure favorable rulings; furthermore, en banc review is proper to avoid appearance which might be viewed as a reluctance on the part of the judiciary to hold governmental cloaked agents and agencies accountable for their actions.

It is abundantly clear that the dismissal upon grounds of mootness in Appeal No. 92-2819 is contrary to the established Supreme Court case precedent identified infra at Issue One. Furthermore, the panel decision stating "Appeal No. 93-3492 is wholly without merit" assumes matters not found in the court record and prejudges the very de novo issues that binding Supreme Court case authority compels to be resolved upon plenary review and trial de novo upon every issue of law relating back to the filing of Plaintiff's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief of Appellants and Record Excerpts have been served, by U.S. Mail, postage pre-paid, this 9th day of November, 1994 to the following addressees:

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